make him answer to the said United States touching and concerning the premises aforesaid.

Charles M. Irelan, Attorney of the United States in and for the District of Columbia, by William W. Sewell, His said Assistant. (Seal.)

Personally appeared Hugh J. McGee before me this 7th day of October, A. D. 1952, and being duly sworn according to law, doth declare and say that the facts as set forth in the foregoing information are true.

William W. Sewell, Assistant Attorney of the United States in and for the District of Columbia.

[File endorsement omitted]

7/6 G-Jail 29
Bond L. W.

No. 500702

UNITED STATES, NB

vs.

FRANK LEWIS, 32 DeFrees St., N. W.

Occupational Tax Stamp Act.
Violation T 26 Sec 3290 U. S. Code
Atty Ehrlich

[fol. 3] WITNESSES:

John Lynch Bureau of Internal Rev.
Oct 7 1952. Cont. 10-31-52 Deft. Bond set at $500 JPC
Set for 1:30 pm. Mary C. Barlow Committed SFO
10/28/52 Motion to dismiss filed this date. Set 10-31-52.
Oct 31 1952. Cont. 11-12-52 Deft.

RGD TCS

Committed RE
Nov 12, 1952. Cont. 11-26-52 PM AJH Committed RE
Nov 26 1952 C 12-10-52 EHS AJH
Committed AR

Dec 10 1952. C 12-30-52 EHS reduced B 300 EHS AJH Committed RE

Dec 30, 1952. Cont. 1/30/53 Govt Committed RE FG MK

Jan 30 1953. Cont 6-3-53 Govt S Frank H. Myers Committed RE

May 7 1953. Motion to be heard May 22, 1953. TCS

Judge Scalley

May 21 1953. Brief for Deft submitted. Govt. to prepare brief to submit. C 6-5-53 JPC TCS

May 27 1953. Motion to extend time for filing of Govt. Brief extended to and including July 6, 1953 granted.

JMB TCS

July 6, 1953. Brief of Government filed of this date. TCS

Judge Scalley

7-24-53. Motion to dismiss granted.

JPC TCS

August 3, 1953. Notice of Appeal filed. ALC

August 7, 1953. Designation of Record and Statement of Errors filed. ALC

[fol. 4] August 13, 1953. Statement of Proceedings and Evidence filed and submitted to Trial Judge. WN

August 18, 1953. Agreed Statement of Proceedings and Evidence filed and submitted to Trial Judge. WN

August 19, 1953. Agreed Statement of Proceedings and Evidence approved by Trial Judge. WN

* * * * * * *

In The Municipal Court for the District of Columbia

Order Extending Time, Etc.—May 27, 1953

Upon consideration of the motion by the United States for an extension of time to and including July 6, 1953 within which to file its memorandum brief in opposition to motion to dismiss in the above entitled case, It is

Ordered that the motion be, and it is hereby, granted.

(Signed) Thomes C. Scalley, Judge.

* * * * * * *

In The Municipal Court for the District of Columbia

Motion to Dismiss Information—Filed October 28, 1952

The defendant moves that the information filed herein against him be dismissed on the following grounds:

1. Chapter 27a of the Revenue Act of 1951, upon which the information is based, is unconstitutional in that its provisions impose penalties upon the defendant in the guise of taxes.

2. Chapter 27a of the Revenue Act of 1951, upon which the information is based, contravenes the Fifth Amendment to the United States Constitution because the information required to be given by defendant in conformance with said Chapter compels defendant to be a witness against himself and to incriminate himself.

[fol. 5] 3. And for other reasons to be brought to the attention of the Court at this time this motion is argued.

(Signed) Myron G. Ehrlich, Attorney for Defendant, Columbian Building.

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In The Municipal Court for the District of Columbia

Opinion

The issue raised by both the Motion to Dismiss and brief in support thereof filed herein and in argument before this

Court is the constitutionality of the occupational tax provisions of the Revenue Act of 1951 [1] which among other things levies a tax on persons engaged in the business of accepting wagers, requires such persons to register with the Collector of Internal Revenue (now Director of Internal Revenue) and contains certain "posting" provisions. The unconstitutionality of these provisions is asserted on three grounds.

First, it is urged that the provisions of Chapter 27A of the Internal Revenue Code contravene the Fifth Amendment in that compliance with said provisions compels a person within the District of Columbia to give information which will incriminate or tend to incriminate him of a violation or violati ns of Federal law, to wit, Sections 1501, 1502, 1503, 1508 of Title 22 of the District of Columbia Code and also Section 371 of Title 18, United States Code.

Secondly, it is urged that Chapter 27A imposes penalties in the guise of taxes, as evidence of the commission of a Federal crime, to wit, violation of any or all of the sections of the District of Columbia Code and United States Code hereinbefore cited, is first required before the tax can be imposed and, therefore, the tax constitutes a criminal sanction and is a penalty and not a true tax.

[fol. 6] Thirdly, it is urged that Chapter 27A of the Internal Revenue Code contravenes the Fourth Amendment in that compliance with its provisions, specifically Sections 3275 and 3293 of Title 26, U.S.C. illegally compels disclosures which could be used as a predicate for the issuance of a warrant resulting in an unlawful search and seizure.

The United States in opposing the defendant's Motion to Dismiss filed a memorandum brief in support of its position urging that the case of United States v. Kahringer, U.S. , decided March 9, 1953, is controlling.

At the outset I find that there can be no doubt that criminal laws enacted by the Congress of the United States with respect to criminal activities within the District of Colum-

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[1] 26 U. S. C. Sec. 3285, 3290, 3291, 3293, 3275.

bia are Federal laws [1] and this the United States necessarily so concedes.[2]

The defendant in this case is charged by information as follows:

> "Frank Lewis on December 13, 1951, and on diverse other days thereafter during the month of December 1951, in the District of Columbia *engaged in the business of accepting wagers, by reason of such activity he was required by law to pay the occupational tax (wagering) of $50.00 as imposed by Section 3290 of Internal Revenue Code,* he failed to pay said tax, all in violation of Section 3294(a) Internal Revenue Code; Title 26 in violation of Section 3294 (a) and Section 2707 (b) Internal Revenue Code as made applicable by Section 3294 (c) Internal Revenue Code." (Italics supplied)

The United States, by the charging provision of this information concedes what is obvious from a reading of Chapter 27A of the Internal Revenue Code and the provisions contained therein, to wit, that it is only by reason of the fact that the defendant engaged in the business of accepting [fol. 7] wagers that it charges he was required by Section 3290, Title 26 U. S. C. to pay the tax.

For the United States to prove that this defendant is guilty as charged in the information filed herein would require the United States to prove at trial not merely that this defendant failed to register pursuant to Section 3291 of Title 26, U.S.C. and pay the occupational tax imposed by Section 3290 of Title 26, U.S.C. but further and necessarily that subsequent to the enactment of Chapter 27A of the Internal Revenue Code he engaged in the business of accepting wagers in the District of Columbia. Such proof, however, would constitute proof of a violation or

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[1] *Arnstein* v. *U. S.*, 54 App. D. C. 199, 296 F. 946, Cert. denied 264 U. S. 595.

*Story* v. *Rives*, 97 F. 2d 182, Cert. denied 305 U. S. 595.

[2] Memorandum in Opposition to Defendant's Motion to Dismiss the Information, filed by the United States of America, July 6, 1953, page 13.

activity within the District of Columbia which requires registration and is taxed under the provisions of Chapter 27A. All persons in the District of Columbia engaged in those gambling activities covered by Chapter 27A can reasonably fear that compliance with its provisions will tend to or will, in fact, incriminate them of violations of Federal law.

Against, the difference in posture between the Kahringer case and the instant case is made more readily apparent by a fuller reading of the briefs filed by the United States in the Supreme Court. These briefs will disclose that they were devoted to the question of application of these taxes on wagering activities *in the states* with the exception of the discussion of the Federal lottery laws heretofore noted. The United States argued throughout for the constitutionality of Chapter 27A of the Internal Revenue Code on the ground that there is no doubt that federal taxes can be imposed on occupations *forbidden by state law. As a matter of fact the United States took the position that wagering is not unlawful under any federal law.* In its reply brief, the United States stated at page 2 thereof:

> [fol. 9] "We submit that the registration requirements of Sec. 3291 clearly do not violate the Fifth Amendment. In the first place, *the occupation taxes is unlawful only under state laws*, and the federal privilege against selfincrimination protects only against inquiries incriminatory under federal law . . ." (Italics supplied.)

Again, at page 3 of its reply brief the United States stated:

> "Section 3290 imposes a tax on the occupation of wagering. *Wagering is doubtless unlawful in many* states (perhaps in all but Nevada), but *it is not forbidden by any federal law.*
>
> "Thus, *the registration statement* in which the taxpayer is required to set forth his name, address and places of business, and the names and addresses of his agents or principals *does not call for a disclosure of information which will reveal a violation of federal law.*

"It is established that the self-incrimination clause of the Fifth Amendment only relates to information incriminatory under federal law . . ." (Italics supplied.)

That the Congress of the United States can enact legislation which is valid requiring registration and payment of excise taxes on various business activities which are legal in some states and illegal in others there can be no doubt. Such legislation has been sustained by the Supreme Court in many instances. Not only did the United States in its briefs in the Kahringer case, supra, cite those instances at great length but likewise did the Supreme Court rely on those same cases as corroborative of the power of Congress to so legislate.

I failed to find one single instance wherein the Supreme Court passed on any act of Congress which imposed a tax on an activity declared illegal by Congress and containing provisions for registration and payment of taxes which would compel a person engaged in such illegal activity to give answers which would tend to incriminate him. Nor has [fol. 10] the United States cited any such authority in the instant case. I may infer the reason for the lack of any such citation is that Congress has not passed any such tax legislation except the instant Act now being attacked.

The various cases cited by the United States in its briefs in the Kahringer case and cited with approval by the majority in its opinion therein, such as the License Tax cases, 5 Wall. 462; Nigro v. United States, 276 U.S. 332; United States v. Sonzinsky, 300 U.S. 506; United States v. Sanchez, 340 U.S. 42, and the remainder dealt solely with cases construing statutes imposing taxes and requiring registration by the person engaging in such activities, but in not one single instance can I find where Congress made any such activity unlawful if the tax was paid and the registration procedures complied with. Such is not the posture of the present case. Further, the United States in its reply brief at page 23 in the Kahringer case relied on several Prohibition Act cases and said:

". . . The cases sustaining the authority of Congress to impose taxes on occupations illegal under fed-

> eral law are especially significant in this connection. It was held in a number of cases that persons engaged in selling liquor during the period of national prohibition were still required to pay the federal taxes on the forbidden traffic. United States v. Stafoff, 260 U.S. 477, 480; United States v. One Ford Coupe, 272 U.S. 321, 327; United States v. Sullivan, 274 U.S. 259, 263."

But to the contrary, however, I find that those very cases support this defendant. The United States completely overlooked Section 35 of Title II of the National Prohibition Act which reads in part as follows:

> "*No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance,* but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with [fol. 11] an additional penalty of $500 on retail dealers and $1,000 on manufacturers." (italics supplied)

Accordingly, since no liquor revenue stamps or tax receipts for any illegal manufacture or sale were to be issued in advance, there was no requirement such as is present in the wagering tax law which compels a person to give evidence against himself in an endeavor to comply with its provisions.

An additional point which was strongly urged by the United States in its memorandum brief is that the wagering tax applies to future acts and not past acts and, therefore, the privilege against self-incrimination is not available and cites for its authority in support thereof that portion of the opinion of the Supreme Court in the Kahringer case which reads as follows:[1]

> "Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or may not be committed, 8 Wigmore (3d ed., 1940) Sec. 2259(c). If respondent wishes to take wagers subject to excise

[1] Slip Opinion, page 10.

taxes under Sec. 3285, supra, he must pay an occupational tax and register. Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions."

Even if, for the sake of argument, it were to be admitted that this contention in general is sound, I feel it would fall in the District of Columbia by the virtue of the criminal sanctions that can be imposed under Section 371 of Title 18, U.S.C. For even assuming that the payment of the tax and registering would not compel a confession of past illegal substantive acts, nevertheless if two or more persons conspired to violate any of the anti-gambling provisions of the District of Columbia and in pursuance of that conspiracy one [fol. 12] of the conspirators applied for a tax stamp, such an act would be an overt act in furtherance of the conspiracy and sufficient to sustain a conviction. And I believe that even if Chapter 27A, supra, contained the words "before going into the business", which it does not, or if it incorporated by reference Section 3270 of Title 26, U. S. C. which will be discussed later, the foregoing examples would still apply.

However, I find that the United States' contention is neither supported by a review of Chapter 27A of the Internal Revenue Code nor the cases cited in support thereof. The foregoing quotation from the Supreme Court opinion is a paraphrase of language first appearing in the reply brief of the United States in the Kahringer case, supra, (pages 27 and 28) wherein the argument that the tax applies in future was first raised. However, the cases cited by the United States and also cited by the Supreme Court in its opinion, I believe, are not authority for that statement. The cases cited were Cf. Davis v. United States, 328 U.S. 582, 590; Shapiro v. United States, 335 U.S. 1, 35; E. Fougera & Co. v. City of New York, 224 N.Y. 269, 281, 210 N.E. 692.

In E. Fougera & Co., Inc. v. City of New York, supra, a city ordinance required dealers in patent medicines to reg-

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1954

## No. 203

FRANK LEWIS, PETITIONER,

*vs.*

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JULY 9, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1954

# No. 203

FRANK LEWIS, PETITIONER,

*vs.*

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## INDEX



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 22, 1954

—8628

[fol. 1]

**IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA, CRIMINAL DIVISION, OCTOBER TERM, A. D. 1952**

INFORMATION—Filed October 7, 1952

DISTRICT OF COLUMBIA, ss:

Charles M. Irelan, Esquire, Attorney of the United States in and for the District of Columbia, who, for the said United States, prosecutes in this behalf, by William W. Sewell, Esquire, one of his assistants, comes here into Court, at the District aforesaid, on the 7th day of October, in the year of our Lord, one thousand nine hundred and fifty-two, in this said Term, and for the said United States, gives the Court here to understand and be informed, on the oath of one Hugh J. McGee that one Frank Lewis late of the District aforesaid, on the 13th day of December and on diverse other days thereafter in the year of our Lord, one thousand nine hundred and 51 with force and arms, at the District aforesaid, and within the jurisdiction of this Court, Frank Lewis on December 13, 1951 and on diverse other days thereafter during the month of December 1951 in the District of Columbia engaged in the business of accepting wagers, by reason of such activity he was required by law to pay the occupational tax (wagering) of Fifty Dollars ($50.00) as imposed by Section 3290 of Internal Revenue C he failed to pay said tax, all in violation of Section 3294(a) Internal Revenue Code: Title 26 U.S. Code Section 3294(a) and Section 2707(a) Internal Revenue Code as made applicable by Section 3294(c) Internal Revenue Code against the form of the statute is such case made and provided, and against the peace and Government of the United States of America.

Whereupon, the said Attorney of the United States, who, in this behalf prosecutes for the said United States, in man-
[fol. 2] ner and form as aforesaid, prays the consideration of the Court here in the premises, and that due proceedings may be had against the said Frank Lewis in this behalf to

violations of Federal law, to wit, certain sections of the District of Columbia Code, supra, and/or Section 371 of Title 18, U.S.C. In fact, the only persons within the District of Columbia who are required to comply with the provisions of Chapter 27A are those engaged in activities which have been made unlawful by Federal law.

Immediately, therefore, this case receives an entirely different complexion than was presented to the Supreme Court of the United States in the case of United States v. Kahringer, supra. A reading of the Reply Brief for the United States filed with the Supreme Court in that case, particularly pages 13 et seq., confirms this statement. The appellee in the Kahringer case, supra, had urged that the registration provisions of Chapter 27A, supra compelled him to give testimony incriminatory under Federal as well as state laws, citing the Federal lottery laws, 18 U.S.C. 1301, 1302.[1] The United States urged that Chapter 27A could not be said, because of its registration provisions, to be on its face incriminatory under Federal statutes because other types of wagering other than possible violations of the Federal lottery laws were included in Chapter 27A and at most only a small proportion of persons subject to the wagering taxes might have a basis for raising the privilege against self-[fol. 8] incrimination.[1] The United States argued further to the Supreme Court that inasmuch as only a small number of people might have reasonable cause to apprehend danger from complying, there was not created a setting which made the danger of prosecution for violation of the Federal lottery laws reasonably likely and concluded that the required report or return does not call for information which is incriminating on its face.[2] But the contention advanced by the United States in the Kahringer case, supra, I do not believe applies to the present case, for within the District of Columbia it is not any small group who might possibly tend to incriminate themselves by compliance with Chapter 27A, supra, but is every person who engages in any business

[1] Reply Brief for the United States, *United States* v. *Kahringer*, page 13.

[1] Ibid. page 16.

[2] Ibid. page 24.

ister the names of ingredients for which therapeutic effects were claimed with the Department of Health. The plaintiffs contended the ordinance violated their privilege against self-incrimination in that a disclosure of the ingredients would tend to convict them of using improper ingredients in contravention of health laws. Justice Cardozo, in determining that the Fifth Amendment was not violated, said:

> "The sale of medicines is a business subject to governmental regulation. One who engages in it is not compelled by this ordinance to expose himself to punishment for any offense already committed. *He is simply notified of the conditions upon which he may do* [fol. 13] *business in the future.* He makes his own choice. To such a situation, the privilege against self-accusation has no just application." (Italics supplied.)

As will be observed, a dealer in patent medicine who used proper ingredients would be permitted to do business without interference from the Health Department provided he complied with the conditions, namely, a description of the ingredients used. In other words, by complying he would be licensed to engage in the business subject to no Governmental interference contrary to the result if this defendant complied with the provision of Chapter 27A.

In Shapiro v. United States, supra, quoting from Davis v. United States, supra, re certain records required by law to be kept by a citizen, the situation was entirely different than the one posed in the instant case. There the majority held that the Federal Government had the power to regulate the business under the Price Control Act, required certain records to be kept and compliance with the Act licensed the person to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of Governmental regulation. If, as was pointed out therein, the person required to keep the books violates the Act and in making entries the commission of that crime by him is reflected, the criminality of the entries exists by his own choice and election. He would not, if he kept his own books and records and made proper entries, incriminate himself of any other federal act and would be, as has been said previously, licensed to engage in the business without fear of incriminat-

ing himself under some other federal law. Therefore, those cases justifying the requirement of keeping and producing public records because of a licensing or regulatory power are not applicable to this case.

Nor is the treatise by Professor Wigmore which was also cited applicable in the instant case.[1]

> [fol. 14] ". . . The duty or compulsion to disclose the books existed generically, and prior to the specific act; . . . the duty or compulsion is directed to the generic class of acts, not the criminal act, and is anterior to and independent of the crime; the crime being due to the party's own election, made subsequent to the origin of the duty . . ."
> and concluded:
>
> "The generalization, therefore, may be made that there is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which is a particular one, may or may not in future be criminal at the choice of the party reporting . . .".

In disposing of the application of Professor Wigmore's statement to the instant case it is clear that the Federal criminal laws involved here antedate Chapter 27A, supra. Further, the duty or compulsion to register and pay the tax is directed to the criminal act and is subsequent to the doing of the criminal act and not prior thereto. When the Supreme Court stated that the appellee in the Kahringer case, supra, was not compelled to confess to criminal acts already committed, it was merely passing on a statute which, when applied to a person who by registering might admit past acts in violation of state law, would not by such registration be admitting past acts in violation of Federal law. I have hereinbefore set forth excerpts from the briefs of the United States in the Kahringer case, supra, for the purpose of showing that the United States repeatedly pointed out to the Supreme Court that there were "at present" no Federal laws prohibiting wagering activities covered by Chapter 27A, supra. Therefore, if it were true

[1] 8 Wigmore (3d Ed. 1940) Sec. 2259(c).

that "at present" there are no Federal laws prohibiting the wagering activities covered by Chapter 27A, this act would, in fact, be prospective in its application. It could then be properly called in futuro. But the fallacy in the argument of the United States when applied to this case is that there [fol. 15] are Federal laws prohibiting in the District of Columbia every type of wagering activity covered by Chapter 27A. Accordingly, in the District of Columbia, the Act applies to past acts in violation of Federal law and is not prospective in its application.

In arriving at the conclusion that Section 3290 applies to past acts and not future acts, it is necessary to review the pertinent provisions of Chapter 27A of the Internal Revenue Code. I can find no single line or word therein which could enable a conclusion other than registration and the payment of the tax required until a person has first engaged in an activity covered by Chapter 27A. An analysis of Chapter 27A will disclose the following:

Section 3290 of the Internal Revenue Code provides:

> "Sec. 3290. Tax.
>
> "A special tax of $50 per year shall be paid by each person *who is liable for tax under subchapter A or who is engaged in receiving wagers* for or on behalf of any person so liable." (italics supplied)

Now, however, in order to understand who is liable for the tax imposed by Section 3290, supra, it of necessity requires a reading of Subchapter (a) of Chapter 274 of the Internal Revenue Code.

Section 3285(d), Title 26 U. S. C. (Chapter 27A of the Internal Revenue Code, subchapter A) defines the persons liable for the tax. That subsection reads as follows:

> "(d) Persons liable for tax.
>
> "Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

[fol. 16] In addition to the definition contained in the statute itself, the Bureau of Internal Revenue has interpreted the meaning of "engaged in business" in Regs. 132, relating to excise and special tax on wagering under Chapter 27A of the Internal Revenue Code, Part 325 of Title 26), Codification of Federal Regalations, and as amended July 16, 1952.

> "SEC. 325.21. Scope of tax . . .
>
> "(b) *A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers* with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted. It is not intended that to be engaged in the business of accepting wagers a person must be either so engaged to the exclusion of all other activities or even primarily so engaged. Thus, for example, an individual may be primarily engaged in business as a salesman, and also for the purpose of the tax be engaged in the business of accepting wagers." (italics supplied)

Regs. 132, Section 325.25(a), "When tax attaches" reads as follows:

> "SEC. 325.25. When tax attaches.
>
> "(a) The tax attaches when (1) a person engaged in the business of accepting wagers with respect to a sports event or a contest, or a person who operates a wagering pool or lottery for profit, *accepts a wager or contribution from a bettor.* In the case of a wager or credit, the tax attaches whether or not the amount of the wager is actually collected from the bettor." (italics supplied)

Quite obviously, therefore, in the light of the statute itself, as well as the interpretation appearing in the Regulations, a person is not liable for the payment of the occupational tax until he has accepted a minimum of one wager but a more reasonable interpretation probably is the one made by the Bureau of Internal Revenue, namely, making it a practice to accept wagers. Until such a practice is shown [fol. 17] there is no liability under Section 3290. The Gov-

ernment has impliedly conceded the accuracy of the statement in the charging portion of the information, supra, wherein it states that it is by reason of such activity, to wit, engaging in the business of accepting wagers, that the defendant was required to register.

It is true that the Bureau of Internal Revenue amended Regs. 132 on July 16, 1952, which now reads in part as follows:

> "Sec. 325.50. *Registry, return and payment of tax.* (a) No person shall engage in the business of accepting wagers subject to the 10 percent excise tax imposed by section 3285 of the Internal Revenue Code (see section 325.24) until he has filed a return on Form 11-C and paid the special tax imposed by section 3290. Likewise, no person shall engage in receiving wagers for or on behalf of any person engaged in such business until he has filed a return on Form 11-C and paid the special tax imposed by section 3290 of the Internal Revenue Code . . ."
>
> * * * * * * *
>
> "(c) Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may accept wagers on his behalf . . .
>
> "(d) Each agent or employee of a person accepting wagers shall report on Form 11-C the name and residence address of each person (i. e., individual partnership, corporation, etc.) on whose behalf wagers are to be accepted. . . . "

I fail to find any language in Chapter 27A, supra, on which the Bureau of Internal Revenue can rely in support of this amended regulation. I feel the Bureau of Internal Revenue has misconceived the meaning of Section 3271 of Title 26, U. S. C. and has failed to realize that Section 3270 of Title 26, U. S. C. *is not applicable* to Chapter 27A as Section 3292 of Title 26 U. S. C., which incorporated certain

[fol. 18] other sections by reference, omits it. Section 3292 reads as follows:

"Sec. 3292. *Certain provisions made applicable.*

"Sections *3271, 3273(a), 3275, 3276, 3277, 3279,* and *3280* shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation described in chapter 27. No other provision of subchapter B of chapter 27 shall so extend or apply." (italics supplied)

The Bureau of Internal Revenue has drafted Section 325.50, supra, as though Section 3270 had been incorporated by reference. Section 3270 reads as follows:

"Sec. 3270. Registration.

"(a) Requirements. Every person engaged in any trade or business on which a special tax is imposed by law shall register with the collector of the district his name or style, place of residence, trade or business, and the place *where such trade or business is to be carried on.* In case of a firm or company, the names of the several persons constituting the same, and the places of residence, shall be so registered." (italics supplied)

But Section 3291, Title 26 U. S. C. which was substituted for the foregoing reads as follows:

"Sec. 3291. Registration.

"(a) *Each person required to pay a special tax under this subchapter shall register with the collector of the district—*

"(1) *his name and place of residence;*

"(2) *if he is liable for tax under subchapter A,* each place of business where the activity which makes him so liable *is carried on,* and the name and place of residence of each person *who is engaged in receiving wagers* for him or on his behalf; and

"(3) *if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A*, the name and place of residence of each such person.

[fol. 19] "(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

"(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required under this section as may be needful to the enforcement of this chapter." (Italics supplied.)

Section 3271 (a) must be read hand in hand with the foregoing sections. It reads as follows:

"Sec. 3271. Payment of tax.

"(a) Condition precedent to doing business. No person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor *in the manner provided in this chapter.*" (Italics supplied.)

As stated previously, the interpretation the Bureau has given to Section 3271 (a) is as if that section read "no person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor." However, as will be observed, Section 3271(a) is not so limited but concludes " . . . until he has paid a special tax therefor in the manner provided in this chapter."

Congress did not incorporate Section 3270 by reference. (See Section 3292). In its place it drafted new sections, to wit, Sections 3285, 3290 and 3291, predicating the liability for the tax and requirements for registration on the fact that a person is engaged in the business, not on the premise that he is going to engage in the business. Therefore, the manner provided for in this chapter is to pay the $50 tax by stamp and register when liable for the tax imposed by subchapter A.

I believe that the above interpretation is accurate and that Chapter 27A can be subjected to no other construction

[fol. 20] is made further apparent by reference to the Committee Reports dealing with the wagering tax. The United States in its brief in U. S. v. Joseph Kahringer, supra, stated at page 14 thereof:

> "As we have noted, the Committee Reports state that the occupational tax is an 'integral part' of the plan for collecting the 10 per cent tax on wagers. *The registration provisions are directly related to the enforcement and collection of both taxes.* The taxes affect a large and complex business operated by a class of citizens from whom willing compliance and cooperation are not to be expected. It unquestionably facilitates the collection of a tax on a business to have the person engaged in such business specify his name, address and place of business and the names and addresses of the persons either who carry on the business for him or for whom he carries on the business . . ." (Italics supplied.)

In making that statement the U. S. relied on the statement appearing in H. Report 586, page 60, S. Report 781, page 181, wherein it was stated:

> "The committee conceives of the occupational tax as an integral part of any plan for the taxation of wagers and as essential to the collection and enforcement of such a tax. Enforcement of a tax on wagers frequently will necessitate the tracing of transactions through complex business relationships, thus requiring the identification of the various steps involved. For this reason, *the bill provides that a person who pays the occupational tax must, as part of his registration, identify those persons who are engaged in receiving wagers for or on his behalf, and, in addition, identify* the persons on whose behalf he is engaged in receiving wagers." (H. Rep. 586, 82d Cong., 1st Sess., p. 60; S. Rep. 781, 82d Cong., 1st Sess., p. 118). (Italics supplied.)

It is thus observed that the Congressional intention was that information demanded by the registration form must be given when the person liable for the tax imposed by subchapter A, appears to pay the $50 occupational tax.

[fol. 21] I believe the information required calls for answers that this defendant could reasonably fear would incriminate or tend to incriminate him of a violation or violations of Federal law. This is all that is required to bring into effect the Fifth Amendment. The most recent enunciation re self-incrimination is in Hoffman v. United States, 71 S. Ct. 814, 818, where the Court said:

> "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. (Patricia) Blau v. United States, 1950, 340 U. S. 159, 71 S. Ct. 232 . . ."

Nor should Section 472, Effective Date of Part VII, which is contained in Chapter 27A, supra, be overlooked.[1] As will be observed, the first time a person is liable for the tax imposed by Section 3290 which is incorporated in Subchapter (B) is on the same day that a person engaged in wagering activities within the purview of Chapter 27A first is liable for the 10 per cent tax under Subchapter (A) of Chapter 27A, supra. Certainly, if Congress had intended that the $50 tax and registration should be paid before the acceptance of a wager, it would have so provided in the foregoing "grace period" provision.

Further, the existence of various Treasury Regulations[2] and the policies of the Bureau of Internal Revenue as stated to this court by defense counsel to make the return avail-

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[1] "The tax imposed by subchapter A of Chapter 27A, as added by section 471, shall apply only with respect to wagers placed on or after the first day of the first month which begins more than 10 days after the date of enactment of this Act. No tax shall be payable under subchapter B of Chapter 27A, as added by section 471, with respect to any period prior to the first day of the first month which begins more than 10 days after the date of enactment of this Act. . . ."

[2] Treasury Decision 4929, Sections 463C.32, 463C.33, 463.34. Treasury Decision 5138, Section 458.611.

able to prosecuting officials and not contradicted by the United States lend further basis for the well founded per- [fol. 22] turbation that this defendant has with respect to compliance with Section 3290.

It is obvious that compliance would result in his giving to the United States Attorney in this District the best of proof to go further and prosecute him and others associated with him in the business of gambling in the District of Columbia for violation or violations of the District of Columbia Code as well as Section 371 of Title 18, U. S. C. and Sections 1301, 1302 of Title 18, U. S. C.

One other point was advanced by the United States in its Memorandum, wherein relying on the case of United States v. Sullivan, 274 U. S. 259, it contended that this defendant was not entitled the privilege against self-incrimination in that he had failed to file a return. In this regard the United States pointed out that the majority opinion in the Kahringer case, supra, had likewise made reference to the Sullivan case. The majority opinion states:[1]

> "Appellee's second assertion is that the wagering tax is unconstitutional because it is a denial of the privilege against self-incrimination as guaranteed by the Fifth Amendment.
>
> "Since appellee failed to register for the wagering tax, it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law are called for. In United States v. Sullivan, 274 U. S. 259, defendant was convicted of refusing to file an income tax return. It was assumed that his income 'was derived from business in violation of the National Prohibition Act.' Id., at 263. 'As the defendant's income was taxed, the statute, of course, required a return. See United States v. Sischo, 262 U. S. 165. In the decision that this was contrary to the Constitution, we are of the opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the

[1] Slip Opinion, page 10, U. S. v. Kahringer.

objection in the return, but could not on that account refuse to make any return at all.' 274 U. S., at 263."

[fol. 23] However, I believe there is a broad distinction between the present case and the facts in the Sullivan case, supra. All that the Sullivan case held was that a person who was a bootlegger in contravention of the National Prohibition Act could not fail to file an income tax return and pay the tax even though the return contained some questions the answers to which might tend to incriminate him. The court in that case said that his procedure was to file the return, pay the tax and then object to answering those questions in the return that might tend to incriminate him. However, that cannot be done under this statute. The statute requires a person who is liable for the 10 per cent tax to pay the $50 occupational tax and register, giving answers with respect to where his place of business is, who his associates are, if any, etc. and such answers will quite obviously incriminate or tend to incriminate him. Nor can the Bureau of Internal Revenue issue a tax stamp unless all the information required by the statute is given and as this court knows the Supreme Court denied certiorari in Combs v. Snyder, 101 F. Supp. 531 (D.D.C.) affirmed 342 U. S. 939, where an individual in this district endeavored to obtain a stamp without giving all the answers required and the Collector of Internal Revenue refused to issue a stamp. In that case a statutory three-man court convened pursuant to Title 28, U. S. C., Section 2282, and refused to aid the applicant in obtaining a stamp on the ground that he came in with unclean hands.

In passing it might be observed that the United States at page 9 of its Memorandum opposing the Motion to Dismiss cites *Combs* v. *Snyder*, supra, as holding the wagering tax law to be constitutional. A reading of the opinion of the United States Court of Appeals for the District of Columbia will disclose that that court did not pass on the constitutionality of the case but denied the plaintiff's motion for preliminary injunction on the ground that a court of equity will deny its aid to one who does not come into court with clean hands. In this regard it should be noted that the

[fol. 24] United States in its brief in the Kahringer case, supra, stated in a footnote a page 9, the following:

> "The *Combs* decision was based primarily on the doctrine of unclean hands and the Government's motion to affirm was based on that principle."

Quite obviously, therefore, this defendant could not pay the tax and file a return without giving answers which would tend to incriminate him due to two reasons, namely, that the statute and registration form require the giving of the answers, and, secondly, the Supreme Court has determined that all the answers called for by Section 3291, Title 26, U. S. C. must be given. Nor could this defendant pay the tax and be in compliance with Chapter 27A of the Internal Revenue Code by merely sending in a check because the Act incorporates by reference Section 3271 which states the only way the tax can be paid, namely, by stamps denoting the tax.

In concluding, with respect to the question of self-incrimination the following comes to the mind of the court. In every instance in the past years that Congress has legislated and required a registration and the payment of a tax prior to a person engaging in a particular activity the payment of the tax involved assured the registrant of freedom from Federal prosecution for engaging in the activity provided he complied with the provisions of the particular act. In the instant case, however, the defendant is told that he must register and pay a $50 tax but not be entitled or licensed to engage in the activities subject to the Act and, further, by such compliance assures himself as positively as he can that he will be prosecuted for engaging in such activities. Accordingly, I believe that a compliance with the registration provisions and payment of the tax required by Chapter 27A, supra, would cause the defendant to incriminate or tend to incriminate himself of violations of many Federal laws, all of which completely prescribe the activities covered by this Chapter.

[fol. 25] Having determined that the provisions of Chapter 27A of the Internal Revenue Code are in contravention of the Fifth Amendment and require this court to sustain

the motion to dismisss filed herein, the court sees no necessity for discussing at length the other points raised by the the defendant in his Motion to Dismiss, brief and argument. In passing, however, the court feels some comment should be made with respect to the other two questions raised by him.

With respect to the question of whether or not the tax involved is a penalty in the guise of a tax, a serious question is presented by the defendant in this regard. I have read carefully the language of the Supreme Court in the case of United States v. Sanchez, supra, wherein the court stated:

> "Second. The tax levied by Sec. 2590(a)(2) is not Conditioned upon the commission of a crime. The tax is on the transfer of marihuana to a person who has not paid the special tax and registered. Such a transfer is not made an unlawful act under the statute. Liability for the payment of the tax rests primarily with the transferee; but if he fails to pay, then the transferor, as here, becomes liable. It is thus the failure of the transferee to pay the tax that gives rise to the liability of the transferor. Since his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction. The fact Congress provided civil procedure for collection indicates its intention that the tax be treated as such. Helvering v. Mitchell, 1938, 303 U.S. 391, 58 S. Ct. 630, 82 L. Ed. 917. Moreover, the Government is seeking to collect the levy by a judicial proceeding with its attendant safeguards. Compare Lipke v. Lederer, 1922, 259 U.S. 557, 42 S. Ct. 549, 66 L. Ed. 1061; Tovar v. Jarecki, 7 Cir., 1949, 173 F. 2d 449."

Appellant United States' Statement as to Jurisdiction, page 5 thereof, filed with the Supreme Court in United States v. Sanchez, supra, reads in part as follows:

> [fol. 26] "There is no liability attached to the transfer of marihuana. It is the failure to pay the tax that gives rise to the criminal liability and not as in *Lipke* v. *Lederer* the criminal liability which creates the tax obligation."

Further, page 8 thereof reads in part as follows:

> "The effect of the ruling below if allowed to stand is to remove all criminal sanctions upon the possession or transfer of untaxed marihuana. The only crime defined by federal law with respect to marihuana is the **possession** or transfer of untaxed marihuana. If the tax imposed is a penalty then the crime of possessing non-tax paid marihuana no longer exists."

Page 27 thereof reads in part as follows:

> "In the present case the tax laid by Section 2590 (a)(2) is not conditioned upon commission of a crime. The tax is upon the transfer of marihuana to a person who has not paid the special tax and registered under Sec. 3230 and 3231. Such a transfer is not made a crime by the statute nor is the tax conditioned upon its being shown that the transfer is made criminal or unlawful by other provisions of law. The only transfers made unlawful by the Act are: (1) A transfer not in pursuance of an official order form (Sec. 2591); and (2) A transfer by a person who has not paid the special tax and registered, Sec. 3234. Acquisition of the drug by any person without having paid the transfer tax is also unlawful, Sec. 2593. It is thus the failure to pay the tax, either the special or transfer tax or the acquisition of the drug without a proper order form, which gives rise to criminal liability and not as in the *Lipke* and *Constantine* cases the criminal liability which gives rise to the tax."

The foregoing quotations reflecting the United States' position and the language of the Supreme Court compel the conclusion that if the Congress had seen fit to make the possession of marihuana a crime the Court would not have sustained the tax as a valid exercise of the taxing power but would have held that since evidence of the commission of [fol. 27] a crime was required before the tax could be imposed, it was a penalty and could not be collected. Quite obviously in the present case evidence of the commission of a crime is called for before the tax becomes owing and due because the tax under Section 3290 is not owing and

due until the person is liable under subchapter (a) of Chapter 27A of the Internal Revenue Code and, if liable, such liability arises only by doing an act in violation of Federal law, thus making it a penalty and not a tax.

With respect to the defendant's argument that by virtue of Section 3275, Title 26, U.S.C. and Section 3283, Title 26, U.S.C. the defendant would be deprived of the protection of the Fourth Amendment, I believe that there is substance to that argument but do not feel required to pass on it in light of all the foregoing.

In concluding, I wish to re-emphasize my strong and always abiding desire to afford the privilege and protection of the Fifth Amendment to those invoking its protection when I believe that the person claiming the privilege has a reason to fear that his actions or statements may tend to incriminate him. Let it never be forgotten that the Fifth Amendment of our Constitution was not adopted to protect the innocent, for the innocent need no such protection. It was adopted to protect those charged with guilt so that they would not be forced to give forth with evidence, documentary or oral, which would bring about their conviction. To say that this defendant, as the United States has said, or any others, engaging in similar activities can avoid the perils of prosecution by refraining from engaging in gambling activities and, accordingly, not be required to register is the purest form of sophistry. This act is supposed to be a revenue raising measure.

Motion to Dismiss granted.

Thomas C. Scalley, Judge.

* * * * * * *

[fol. 28] IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA

NOTICE OF APPEAL—Filed August 3, 1953

Name and address of appellant: United States of America.

Offense: Violation of the Occupational Tax Stamp Act, 26 U.S.C. § 3290, 3294 (a), 3294 (c) and 2707 (b).

Brief description of judgment or order: Motion to Dismiss granted.

Date of judgment or order: July 24, 1953.

The United States of America hereby appeals to the Municipal Court of Appeals for the District of Columbia from the judgment or order above mentioned.

(S.) Leo A. Rover, United States Attorney.

* * * * * * *

IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA

AGREED STATEMENT OF PROCEEDINGS AND EVIDENCE—Filed August 18, 1953

Comes now the United States of America by its attorney, the United States Attorney, and the defendant by his attorneys, Walter E. Gallagher and Myron G. Ehrlich, and make the following agreed statement of proceedings and evidence.

On October 7, 1952, an information was filed against Frank Lewis, the defendant herein, in the Criminal Division of the Municipal Court, wherein it was charged that on December 13, 1951, and on diverse other days thereafter during the month of December, 1951, in the District of Columbia, he engaged in the business of accepting wagers, that by reason of such activity he was required by law to pay the occupational tax (wagering) of Fifty Dollars ($50.00) as imposed by Section 3290 of Internal Revenue Code, and that he failed to pay the said tax, all in violation of Section 3294(a) Internal Revenue Code; Title 26 U. S. [fol. 29] Code Section 3294(a) and Section 2707(b) Internal

Page



MISCELLANEOUS.

Revenue Code as made applicable by Section 3294(c) Internal Revenue Code. On October 28, 1952, Frank Lewis moved to dismiss the information on the grounds that Chapter 27A of the Revenue Act of 1951 is unconstitutional because its provisions (1) impose penalties in the guise of taxes and (2) require a defendant to be a witness against himself and to incriminate himself in violation of the Fifth Amendment and (3) for other reasons to be brought to the attention of the court at the time of the argument on the motion.

After several continuances, the oral hearing on the motion to dismiss was held on May 21, 1953, at which time defendant by his attorneys raised the additional ground that Chapter 27A of the Revenue Act of 1951 contravenes the Fourth Amendment of the Constitution and filed a Memorandum in Support of Motion to Dismiss. Thereafter the Government filed a written opposition thereto. On July 24, 1953, the trial court granted the motion to dismiss and handed down a written opinion in connection therewith.

(S.) Leo A. Rover, United States Attorney;

* * * * * * *

(S.) Walter E. Gallagher, Myron G. Ehrlich, Attorneys for Defendant.

August 24, 1953.

Approved.

(S.) Thomas E. Scalley, Judge.

IN THE

# Supreme Court of the United States

October Term, 1954

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No.

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FRANK LEWIS, *Petitioner*

v.

UNITED STATES OF AMERICA

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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*To the Honorable, the Chief Justices of the United States and the Associate Justices of the Supreme Court of the United States:*

Frank Lewis, the petitioner herein respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 10, 1954 (R. 37) affirming a judgment of the Municipal Court of Appeals for the District of Columbia which had reversed a judgment of the Municipal Court for the District of Columbia dismissing an information charging the petitioner with a violation of 26 U.S.C., Section 3290 (Wagering Tax Act) (Chapter 27A, Internal Revenue Code.)

[fol. 30] IN THE MUNICIPAL COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 1387

UNITED STATES, Appellant,

v.

FRANK LEWIS, Appellee

Appeal from The Municipal Court for the District of Columbia, Criminal Division

(Argued October 5, 1953. Decided November 6, 1953)

Lewis A. Carroll, Assistant United States Attorney, with whom Leo A. Rover, United States Attorney, and William J. Peck, Kenneth D. Wood, and Alexander L. Stevas, Assistant United States Attorneys, were on the brief, for appellant.

Walter E. Gallagher, with whom Myron G. Ehrlich and Joseph Sitnick were on the brief, for appellee.

OPINION

Before Cayton, Chief Judge, and Hood and Quinn, Associate Judges

Cayton, Chief Judge: Frank Lewis was charged by information with having engaged in the business of accepting wagers without paying the occupational tax imposed by Chapter 27A of the Internal Revenue Code, 26 U. S. C. § 3285 *et seq.* (Supp. V, 1952). He moved to dismiss the information and the trial court granted his motion, holding in a written opinion that Chapter 27A is unconstitutional because it compels a defendant to give self-incriminating information and imposes a penalty in the guise of a tax. From that decision the United States has brought this appeal.

Determination of the constitutionality of an act of Congress is, as the Supreme Court has said, one of the most [fol. 31] serious responsibilities of the judiciary. "It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United

States. The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the government rest. This is particularly true of a revenue act of Congress. The provisions of such an act should not be lightly or inadvisedly set aside, although if they be plainly antagonistic to the Constitution it is the duty of the court to so declare." *Nicol* v. *Ames*, 173 U. S. 509, 514.

Much greater has been the unwillingness of courts of first instance to strike down acts of Congress. Out of an awareness of the serious nature of such a procedure and out of a concern for uniform enforcement of federal laws has grown more than a rule of law: a sound and well-defined public policy has been established among the United States District Courts of resolving every intendment in favor of acts of Congress and refraining from nullification of such acts unless some plain mandate of the constitution is clearly shown to have been violated.[1] Thus it has been said: ". . . before pronouncing an act of Congress unconstitutional and unenforceable, a District Court should be even more carefully deliberate and firmly convinced beyond a reasonable doubt of its unconstitutionality than would be necessary on the part of a Circuit Court of Appeals or of the Supreme Court of the United States. A District Court is a one-man court. There are numerous District Courts; and the result of conflicting views of individual District Judges as to the unconstitutionality of acts [fol. 32] of Congress lead to a frequently confusing status in the enforceability of national laws. Wherefore District Courts should be most reluctant to pronounce acts of Congress void. The soundest public policy is conserved when

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[1] La Croix v. United States, W. D. Tenn., 11 F. Supp. 817, *appeal dismissed*, 6th Cir., 85 F. 2d 569; Bemis Bro. Bag Co. v. Feidelson, W.D. Tenn., 13 F. Supp. 153; In re Moore, E.D. Pa., 8 F. Supp. 393; Mather v. MacLaughlin, E.D. Pa., 57 F. 2d 223; United States v. 458.95 Acres of Land, E. D. Pa. 22 F. Supp. 1017.

District Courts do not interfere with the operation of acts of Congress. Pending the final decision of the Supreme Court of the United States, nullification of laws in some districts and their enforcement in other districts leads to much confusion and inequality.'' [1]

To this we would add that a still greater duty of self-restraint rests on courts of limited jurisdiction like the Municipal Court. Such a court should not challenge the right of Congress to make a law unless unconstitutionality is glaring and it is manifest that Congress has exceeded its grant of power.

In applying this test we note first that the wagering tax act here involved has been held valid by a three-judge federal court in this jurisdiction. *Combs* v. *Snyder*, D.C.D.C., 101 F. Supp. 531, *affirmed without opinion*, 342 U. S. 939. Six other district courts have likewise upheld the constitutionality of the same act.[2] And in the only case in which a district court held the act invalid there resulted a reversal by the Supreme Court. *United States* v. *Kahriger*, 345 U. S. 22, *rehearing denied*, 345 U. S. 931. There the highest Court held that the act did not prescribe a penalty or require self-incriminating revelations in violation of the fifth amendment.

Discussing the *Kahriger* decision at length in his opinion, the trial judge found the present case distinguishable. He held compliance with the act would involve self-incrimination, because registration is required only after wagers have been accepted. Therefore, he said, since District of Co- [fol. 33] lumbia laws make the acceptance of wagers a

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[1] La Croix v. United States, *supra*, at 820.

[2] United States v. Penn, M. D. N. C., 111 F. Supp. 605; United States v. Robinson, E. D. Mich., 107 F. Supp. 38; United States v. Smith, S. D. Cal., 106 F. Supp. 9; United States v. Nadler, N. D. Cal., 105 F. Supp. 918; United States v. Forrester, N. D. Ga., 105 F. Supp. 136; United States v. Arnold, Jordon & Wingate, E. D. Va. (No. 478 decided Sept. 18, 1952).

crime,[1] and since such laws are federal laws, one who registers under the act, giving his name and address, and his employees' names and addresses, would necessarily be giving evidence tending to incriminate himself of a violation of federal law. This position is directly contrary to the Supreme Court's ruling in the *Kahriger* case, where it was said: "Since appellee failed to register for the wagering tax, it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law are called for . . . Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or may not be committed. . . . If respondent wishes to take wagers subject to excise taxes under § 3285, supra, he must pay an occupational tax and register. Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions."[2]

Thus the *Kahriger* opinion construed the act to require registration before entering the business of accepting wagers, and held that such was valid and proper. It was not open to the Municipal Court to adopt a different construction.

The trial court also said "even assuming that the payment of the tax and registering would not compel a confession of past illegal substantive acts, nevertheless if two or more persons conspired to violate any of the anti-gambling provisions of the District of Columbia and in pursuance of that conspiracy one of the conspirators applied for a tax stamp such an act would be an overt act in furtherance of the conspiracy and sufficient to sustain a conviction." That statement is answered in the words we have already [fol. 34] quoted from the Kahriger decision to the effect that one who has not registered has no right to claim the constitutional privilege.

The second basis for the decision of the trial court, i.e.,

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[1] Code 1951, § 22-1501 through § 22-1508; 18 U.S.C. § 371 (Supp. V, 1952).

[2] United States v. Kahriger, supra, at page 32.

that the act imposes a penalty in the guise of a tax, is likewise contrary to the holding in *Kahriger*, which, as we have just said, validates the requirement that registration and payment of the tax are necessary before the named business is entered into.

Various other matters and contingencies are discussed in the opinion below, and urged upon us in appellee's brief here, some by way of speculation and others in the form of predictions in terrorem. We consider them to be subordinate to the vital issues we have discussed, and wholly insufficient to support the ruling of unconstitutionality.

Reversed.

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IN THE MUNICIPAL COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

JUDGMENT—November 6, 1953

Appeal from the Municipal Court for the District of Columbia, Criminal Division. This cause came on to be heard on the transcript of the record from the Municipal Court for the District of Columbia, and was argued by counsel. In consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Municipal Court, in this cause, be and the same is hereby, reversed with costs, and that this cause be, and it is hereby, remanded to the said Municipal Court for further proceedings in accordance with the opinion of this Court.

Nathan Cayton, Chief Judge.

[fol. 35] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12009

FRANK LEWIS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the Municipal Court of Appeals for the District of Columbia

Decided June 10, 1954

Mr. Walter E. Gallagher, with whom Mr. Myron G. Ehrlich was on the brief, for appellant.

Mr. Lewis A. Carroll, Assistant United States Attorney, with whom Messrs. Leo A. Rover, United States Attorney, and Kenneth D. Wood and Alexander L. Stevas, Assistant United States Attorneys, were on the brief, for appellee.

OPINION—Filed June 10, 1954

Before Edgerton, Bazelon and Washington, Circuit Judges

PER CURIAM:

This is an appeal from a decision of the Municipal Court of Appeals, holding that the occupational tax imposed by Chapter 27A of the Internal Revenue Code, 26 U. S. C. § 3290 (1952), on the business of accepting wagers, is constitutional in its application to the District of Columbia. [fol. 36] *United States* v. *Lewis*, 100 A.2d 40 (D. C. Mun. App. 1953). That decision is clearly correct, in view of *United States* v. *Kahriger*, 345 U. S. 22, rehearing denied, 345 U. S. 931 (1953). "Of course Congress may tax what it also forbids." *United States* v. *Stafoff*, 260 U. S. 477 at 480 (1923).

Affirmed.

[fols. 37-38] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1954

No. 12,009

FRANK LEWIS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the Municipal Court of Appeals for the District of Columbia

Before Edgerton, Bazelon, and Washington, Circuit Judges

JUDGMENT—Filed June 10, 1954

This cause came on to be heard on the transcript of the record from the Municipal Court of Appeals, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Municipal Court of Appeals appealed from in this cause be, and the same is hereby, affirmed.

Dated: June 10, 1954.

Per Curiam.

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[fol. 39] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 40] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 203

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8628)

IN THE

# Supreme Court of the United States

October Term, 1954

No. 203

FRANK LEWIS, *Petitioner*

v.

UNITED STATES OF AMERICA

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## SUBJECT INDEX



## CASES.

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## OPINIONS BELOW

Opinion of the Municipal Court for the District of Columbia entered on order on July 24, 1953, sustaining Motion to Dismiss (R. 5-27). Opinion of the Municipal Court of Appeals entered on order November 6, 1953, reversing the Municipal Court for the District of Columbia and remanding the case (R. 30-34). 100 A. 2nd 40 (D. C. Mun. App. 1953). Opinion of the United States Court of Appeals for the District of Columbia Circuit entered on order on June 10, 1954, affirming the opinion of the Municipal Court of Appeals for the District of Columbia (R. 35-36).

## JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the judgment of the Municipal Court of Appeals for the District of Columbia was entered on June 10, 1954. A Motion to Stay the issuance of the Mandate for thirty days, to wit, until July 10, 1954, to enable this petitioner to make application to this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit was filed with that Court on June 16, 1954, and on June 23, 1954 that Court ordered the Mandate to be stayed to and including July 10, 1954. The jurisdiction of this Court is conferred by 28 U.S.C., 1254(1).

## QUESTIONS PRESENTED

(1) Does Chapter 27A of the Internal Revenue Code, 26 U.S.C., Section 3285 et seq. (Wagering Tax Act) as applied in the District of Columbia to this petitioner, contravene the Fifth Amendment of the United States Constitution?

(2) Is Chapter 27A of the Internal Revenue Code, 26 U.S.C., Section 3285 et seq. (Wagering Tax Act) as applied in the District of Columbia to this petitioner a legitimate exercise of the taxing power inasmuch as its provisions impose penalties in the guise of taxes?

(3) Do the provisions of Chapter 27A of the Internal Revenue Code, 26 U.S.C., Section 3285 et seq. (Wagering Tax Act) as applied in the District of Columbia to this petitioner contravene the provisions of the Fourth Amendment of the United States Constitution?

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The pertinent texts of the foregoing are set out in the Appendix.

## STATEMENT OF THE CASE

By information filed by the United States in the Municipal Court for the District of Columbia on October 7, 1952, (R. 1-2), the defendant in this case is charged as follows:

> "Frank Lewis on December 13, 1951, and on diverse other days thereafter during the month of December, 1951, in the District of Columbia *engaged in the business of accepting wagers, by reason of such activity he was required by law to pay the occupational tax (wagering) of Fifty Dollars ($50.00) as imposed by Section 3290 of Internal Revenue Code,* he failed to pay said tax, all in violation of Section 3294(a) Internal Revenue Code: Title 26, U.S. Code, Section 3294(a) and Section 2707(b) Internal Revenue Code as made applicable by Section 3294(c) Internal Revenue Code." (Italics supplied)

On October 28, 1952, a Motion to Dismiss this Information was filed. (R. 6)

The Municipal Court for the District of Columbia entered an Order on July 24, 1953, sustaining the Motion to Dismiss (R. 5-27) and filed at that time a written Opinion. The United States filed a Notice of Appeal on August 3, 1953 (R. 28). An Agreed Statement of Proceedings was filed on August 24, 1953 (R. 28-29). The Municipal Court of Appeals for the District of Columbia entered an Order on November 6, 1953, reversing the Municipal Court for the District of Columbia and remanding the case (R. 34). At the same time, the Municipal Court of Appeals for the District of Columbia filed a written Opinion (R. 30-34).

On November 16, 1953, the defendant by his counsel filed a Petition for an Allowance of Appeal to the United States Court of Appeals for the District of Columbia Circuit. The transcript of the Record from the Municipal Court of Appeals for the District of Columbia was filed with the U. S. Court of Appeals for the District of Columbia Circuit on November 20, 1953. The Petition for an Allowance of Appeal was heard on December 23, 1953, and this appeal was allowed on December 24, 1953. The United States Court of Appeals for the District of Columbia on June 10, 1954, affirmed the judgment of the Municipal Court of Appeals for the District of Columbia (R. 37). A Motion to Stay the Issuance of the Mandate for thirty days, to wit, until July 10, 1954, to enable this petitioner to make application to this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the District of Columbia was filed with that Court on June 16 and on June 23, 1954, that Court ordered the Mandate to be stayed to and including July 10, 1954.

## ARGUMENT

The acceptance of wagers in the District of Columbia is wholly prohibited by Federal law.[1] Therefore, this is the first Petition for a Writ of Certiorari to be filed with this Court seeking a determination as to whether or not the provisions of the Wagering Tax Act and the criminal sanc-

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[1] *Arnstein* v. *United States*, 54 App. D.C. 199, 296 Fed. 946, cert. denied 264 U.S. 595; *Storey* v. *Rives*, 68 App. D.C. 325, 97 F. 2d 182, cert. denied, 305 U.S. 395; Act of June 25, 1948, c. 645, 62 Stat. 701, Title 18, U.S.C., Sec. 371 (Federal Conspiracy Statute) (p. 34); Act of March 3, 1901, 31 Stat. 1330, ch. 854, § 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, § 1, Title 22, D.C. Code, Sec. 1501. (prohibits lotteries) (p. 32), Act of April 5, 1938, 52 Stat. 198, ch. 72, § 2, Title 22, D.C. Code, Sec. 1502 (prohibits lotteries) (App. p. 6); Act of March 3, 1901, 31 Stat. 1330, ch. 854, § 864, Title 22, D. C. Code, Sec. 1503 (prohibits lotteries) (p. 32), Act of March 3, 1901, 31 Stat. 1331, ch. 854, § 869; May 16, 1908, 35 Stat. 164, ch. 172, § 3, Title 22, D.C. Code, Sec. 1508 (prohibits betting, gambling and making book on races or contests of any kind) (p. 33).

tions provided therein are constitutional as applied to persons engaged in the business of accepting wagers in the District of Columbia.

*United States* v. *Kahriger*, 73 S. Ct. 519, 345 U.S. 22, rehearing denied 345 U.S. 931, is not authority for the constitutionality of the provisions of the Wagering Tax Act as applied in the District of Columbia as in that case this Court merely passed on the validity of the Wagering Tax Act as applied to wagering activities *in the states.* This Court stated in the Kahriger case, supra, at page 512:

> "The wagering tax with which we are here concerned applies to all persons engaged in the business of receiving wagers *regardless of whether such activity violates state law.*" (Italics supplied)

The question before this Court as stated by the United States in its Brief in Kahriger, *supra,* at page 2 was "Whether the occupational tax provisions of the Revenue Act of 1951 (26 U.S.C., Supp. V, 3290) which levy a tax on persons engaged in the business of accepting wagers, and require such persons to register with the Collector of Internal Revenue, are unconstitutional *because incidental regulatory features of the registration section (26 U.S.C., Supp. V, 3291) infringe the police power reserved to the states.*" (Italics supplied) The question of the constitutionality of the Wagering Tax Act as applied in a federal jurisdiction which wholly prohibits wagering activities was never raised. In fact the United States in its Reply Brief filed in Kahriger, *supra,* stated at page 2 "*. . . the occupation taxed is unlawful only under state laws . . .*" and at page 3 "*. . . Wagering is doubtless unlawful in many states (perhaps in all but Nevada) but it is not forbidden by any Federal law. Thus the registration statement* in which the taxpayer is required to set forth his name, address and places of business, and the names and addresses of his agents or principals *does not call for a disclosure of information which will reveal a violation of federal law.*" The contrary is the fact in the District of Columbia.

This case arose in the District of Columbia by the filing of an information by the United States in the Municipal Court for the District of Columbia on October 7, 1952 (R. 1-2). In that information this petitioner was charged with engaging in the business of accepting wagers in the District of Columbia and by reason of such activity was required to pay the $50 tax required by the Wagering Tax Act[2] and violated this provision by failing to pay the $50 tax. A Motion to Dismiss was filed by this petitioner in the Municipal Court for the District of Columbia (R. 4-5) on the grounds that the Wagering Tax Act contravened the Fifth Amendment of the United States Constitution, imposed penalties in the guise of taxes and as elaborated in oral argument, also contravened the Fourth Amendment of the Constitution of the United States. The Municipal Court for the District of Columbia sustained the Motion to Dismiss, holding that the decision of this Court in the Kahriger case, *supra,* did not apply in the District of Columbia (R. 5-27). The Municipal Court of Appeals for the District of Columbia reversed the judgment of the Municipal Court for the District of Columbia (R. 34) and in its opinion pointed out its reluctance as a lower court to pass on the constitutionality of acts of Congress and went further to say that since the Kahriger opinion construed the act to require registration before entering the business of accepting wagers, and holding that such was valid and proper, it was not open to the Municipal Court to adopt a different construction. The United States Court of Appeals for the District of Columbia affirmed that decision (R. 37) holding that the lower appellate court was correct in view of *United States* v. *Kahriger, supra.*

It is submitted that the lower appellate courts erred in arriving at their conclusions and their error was committed by failing to consider the rationale which motivated this Court in arriving at its opinion in Kahriger, *supra.* It will be recollected that Kahriger was a defendant who had engaged in the business of accepting wagers in the State

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[2] 26 U.S.C. 3290. Pg. 29.

of Pennsylvania and failed to pay the $50 tax required by Section 3290, *supra*. In that case this Court, properly, and before passing on the validity of the $50 tax section, reviewed its prior decisions with respect to other taxing statutes and cited those decisions[3] as authority for its conclusion that the 10% tax imposed by Subchapter A of the Wagering Tax Act (Section 3285 et seq., Title 26, U.S.C.) was constitutional.

There is a basic and controlling distinction between the instant case and the cases relied on by this Court in Kahriger. *In each and every case so cited, the statutes construed therein by this Court imposed taxes on activities which were not illegal under any Federal law.* Even today, persons engaged in such activities are not subject to Federal prosecution if the required tax is paid and compliance be had with the regulations effectuating such statutes. But the wagering activities embraced by the provisions of the Wagering Tax Act are wholly prohibited by Federal laws to the fullest extent that the United States can proscribe such activities.[4] Absent a constitutional amendment such as the 18th Amendment, the Federal Government has no authority to either permit or prohibit wagering activities in the states. The Constitution, however, confers on Congress sovereign power over the District of Columbia[5] and this power has been exercised to prohibit all wagering activities.

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[3] License Tax Cases, 5 Wall. 462, 18 L. Ed. 497 (Tax on lottery tickets—no federal law prohibiting lotteries at that time); *Veazie Bank* v. *Fenno*, 8 Wall. 533, 19 L. Ed. 482 (Tax on paper money issued by state banks); *McCray* v. *United States*, 195 U.S. 27, 59, 24 S. Ct. 769, 777, 49 L. Ed. 78 (tax on colored oleomargarine); *United States* v. *Doremus*, 249 U.S. 86, 39 S. Ct. 214, 63 L. Ed. 493 and *Nigro* v. *United States*, 276 U.S. 332, 48 S. Ct. 388, 72 L. Ed. 600 (tax on narcotics); *Sonzinsky* v. *United States*, 300 U.S. 506, 57 S. Ct. 554, 81 L. Ed. 772 (tax on firearms); *United States* v. *Sanchez*, 340 U.S. 42, 71 S. Ct. 108, 95 L. Ed. 47 (tax on marihuana).

[4] See Footnote 1.

[5] Article I, Section 8, Clause 17. (Pg. 44)

To state the proposition in another manner; payment of the taxes and registration and filing of returns pursuant to the statutes reviewed in the cases relied on by this Court in Kahriger give to the taxpayers permission to engage in those activities insofar as the Federal Government is concerned. In obeying those laws no revelation of a Federal crime is required. As was pointed out in the License Tax Cases, *supra,* quoted with approval by this Court in Kahriger at page 512, "The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax and of implying nothing except that the licensee shall be *subject to no penalty under national law if he pays it.*" (Italics supplied) To the contrary in the instant case. Compliance with the provisions of the Wagering Tax Act would not exempt this petitioner from any penalties provided by the Federal laws prohibiting wagering in the District of Columbia. Section 3297, Title 26, U.S.C. (Wagering Tax Act) Pg. 31 specifically negates any such conclusion because that section states in part:

> "Sec. 3297. Applicability of Federal and State Laws.
> "The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States. . . ."

It is obvious that compliance with the provisions of the Wagering Tax Act would assure prosecution for the violation of other Federal laws by virtue of the notice which would be given to the United States Attorney by the posting provisions, Sections 3275 (Pg. 47) and 3293 (Pg. 30) and Tr. Dec.[6] which makes these excise returns avail-

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[6] T. D. 4929 Pg. 26 Int. Rev. Cumulative Bulletin:
Sec. 463 C. 32 Pg. 40.
Sec. 463 C. 33 Pg. 40.
Sec. 463 C. 34 Pg. 41.
T. D. 5138 Int. Rev. Cumulative Bulletin, 1942-17-11074 Pg 99:
Sec. 458, 611 Pg. 43.

able to the prosecuting authorities. Therefore, this petitioner was not required to comply with the provisions of the Wagering Tax Act by filing the returns required for if he had done so he would have waived his privilege against self-incrimination. In order to avail one's self of the privilege against self-incrimination a person must invoke the privilege at the first apprehension of danger, that is at the first moment when information is called for which if given by him would incriminate or tend to incriminate him of a violation of Federal law. In the case of *United States* v. *St. Pierre,*[7] the court said:

> "The time for a witness to protect himself is when the decision is first presented to him;" . . .,

The time when the decision is first presented to him differs according to the circumstances. As the court stated in *United States* v. *Pechart:*[8]

> ". . . It is conceded in the record that the defendants were men engaged in gambling and other related so-called racketeering activities. Because of that fact, are they to be deprived of the right to exercise their constitutional privileges?
>
> "Preliminarily to a decision on the fact, I think it may be pertinent and appropriate to state that if the constitutional privilege becomes unavailing to a person because of his occupation, it is but a short step to make it unavailing to a man because he is a Republican or Democrat, or a Catholic or a Jew. The privilege is one that is exercisable by any person provided that the facts and circumstances warrant its exercise." • • •
>
> "Furthermore, the case is not precedentially of any value to us *because the matter of the exercise of privilege may be different in given circumstances, at a different time, and in a different Forum and where different issues are present.* Every case where the exercise of the privilege against self-incrimination is sought to be availed of must be determined with respect to the facts and circumstances of that particular case."

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[7] *United States* v. *St. Pierre,* 132 F. 2d 837, writ dismissed, 63 Sup. Ct. 910, 319 U. S. 41.

[8] *United States* v. *Pechart,* 103 F. Supp. 417, 419.

Where the questions call for answers incriminatory on their face there is no burden on the witness to show special circumstances why the answers called for would be incriminatory.[9] Where they are not incriminatory on their face, the person must show some tangible and substantial probability that his answers to such questions would tend to incriminate him. It is then for the court to finally determine whether incrimination is reasonably possible from any answer the witness may give, but, if such possibility exists the privilege bars compulsory disclosure of any fact that would tend to incriminate him.[10]

It is submitted that this petitioner properly exercised his privilege against self-incrimination by remaining silent and refusing to comply with Sec. 3291, *supra*, and furnishing the information required by Sec. 3291 and Form 730 (Pg. 45-46) because the questions call for answers which on their face incriminate or tend to incriminate in the District of Columbia.

In *Blau* v. *United States*, 340 U. S. 159, at page 160, 71 Sup. Ct. 223, 224, this Court stated:

> "Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act. Prior decisions of this Court have clearly established that under such circumstances, *the Constitution gives a witness the privilege of remaining silent.*" (Italics supplied)

All that is required in invoking the privilege against self-incrimination is that the answer might tend to incriminate or might furnish a link in the chain of evidence which

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[9] *United States* v. *Raley*, 26 F. Supp. 495, 496 (D. C. 1951).

[10] *Estes* v. *Potter*, 183 F. 2d 865, 868, Cert. Denied 81 S. Ct. 356, 340 U. S. 920.

might ultimately incriminate.[11] If a witness having the right to invoke the privilege under such circumstances fails to so do and furnishes the information called for, such person waives the privilege.[12]

An examination of the provisions of the Wagering Tax Act in the order in which they were reviewed by this Court in Kahriger is deemed most appropriate. This requires first of all an examination of the so-called 10% tax section, Section 3285, supra, Subchapter A. Contrary to popular belief, all persons engaged in wagering activities are not liable for the 10% tax imposed by Subchapter A. 26 U.S.C., Sections 3285 (b)(2) and Subsection (e) exempt certain types of wagering activities, for example, poker games, roulette games, crap games, blackjack and the like are not subject to the 10% tax. Accordingly, those persons engaging in the exempted type of wagering activities cannot be required to pay the $50 tax provided by Section 3290 solely because that tax is only owing and due from persons who are liable for the 10% tax. Section 3290 reads as follows:

> "Sec. 3290. Tax.
>
> "A special tax of $50 per year shall be paid by each person *who is liable for tax under subchapter* A or who is engaged in receiving wagers for or on behalf of any person so liable." (Italics supplied)

Obviously there must be a liability for the 10% tax before there is a liability for the $50 tax and if persons are not liable for the 10% tax they cannot be held to be liable for the $50 tax.

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[11] *United States* v. *Burr*, 25 Fed. Cases, pages 38, 40, No. 14,692e. *Hoffman* v. *United States*, 71 S. Ct. 814, 818. *Blau* v. *United States*, 340 U. S. 159.

[12] *Rogers* v. *United States*, 71 S. Ct. 438. *United States ex Rel. Vajtauer* v. *Commissioner*, 47 S. Ct. 302, 273 U. S. 103. *United States* v. *Murdock*, 281 U. S. 141. *United States* v. *Monia*, 317 U. S. 424.

As to those activities which are not exempt from Sections 3285(b)(2) and 3285(e), a reading of Section 3285(d) defines the persons who are liable for the 10% tax. Section 3285(d) reads as follows:

> "Sec. 3285. Tax.
>
> "(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

To ascertain who is liable for the 10% tax requires a determination of what is meant by the words "engaged in the business." This is a phrase of art commonly defined as requiring acts of business to be conducted, prosecuted and continued. A single or occasional disconnected act does not constitute engaging in business.[13] Therefore, several wagers must be accepted before a person can be said to be engaged in the business of accepting wagers. Tr. Reg. 132, Sec. 325.21 (Pg. 35). No matter how narrowly Section 3285(d) is construed, at least one wager must be accepted before a person can be liable for the 10% tax. (Tr. Reg. 132, Sec. 325.24 (Pg. 35)). The Bureau of Internal Revenue by Treasury Reg. 132, Section 325.25 (Pg. 36) states when the 10% tax attaches. That Section reads as follows:

> "Sec. 325.25. When tax attaches.
>
> "(a) The tax attaches when (1) a person engaged in the business of accepting wagers with respect to a sports event or a contest, or (2) a person who operates a wagering pool or lottery for profit, *accepts a wager or contribution from a bettor.* In the case of a wager or credit, the tax attaches whether or not the amount of the wager is actually collected from the bettor." (Italics supplied)

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[13] *Hazen et al.* v. *National Rifle Assn. of America, Inc.*, 101 F. 2d 432, 439.
Black's Law Dictionary, 3d Ed. 1944, p. 260.

The Bureau of Internal Revenue has also by Treasury Reg. 132, Section 325.42, Subsection (b), (Pg. 39) defined the words "commencing business" appearing in Section 3271 (Pg. 43), as "*the initial acceptance of a wager by a person liable* for the *10% excise tax . . .* " (italics supplied).

Sec. 3285(d) provides further that each person shall pay the tax on all wagers *placed with him or placed in a pool or lottery.* Obviously, the tax cannot be compelled to be paid on wagers which have not been placed. The 10% tax has to have at least one wager on which to attach. It cannot fall on a vacuum.

It has been shown that acceptance of even one wager in the District of Columbia is a Federal crime. From this fact it must be concluded that the 10% tax imposed by Subchapter A is unconstitutional and there are two uncontrovertable arguments in support of this assertion.

First, the 10% tax must be paid by the taxpayer on the last day of each month[14] at which time the taxpayer must file a form denominated "Tax on Wagers" (Pgs. 45-46). A reading of this return discloses that all of the questions are incriminatory on their face and are offensive. Therefore, the rule enunciated by this Court in *United States* v. *Sullivan*, 274 U.S. 259, cited by this Court in Kahriger, does not apply. This requirement which compels a person to file this return on the last day of each month constitutes compulsory filing of monthly reports admitting Federal crimes which had been committed by the taxpayer, to wit, the acceptance of wagers in the District of Columbia in violation of Federal law proscribing such activities. But the Fifth Amendment provides that no person shall be compelled to be a witness against himself. Therefore, this section which deals with and can only deal with past acts, namely, the payment of a tax on wagers which have been accepted and the filing of a return admitting that fact contravenes the Fifth Amendment and is unconstitutional.

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[14] T.R. 132 Sec. 325.30 (Pg. 36).
T.R. 132 Sec. 325.32 (Pg. 37).

Secondly, having shown that at least one wager must be accepted before there is any liability for the 10% tax, it is obvious that to successfully collect and retain the taxes alleged to be due the United States would have to claim and ultimately prove that this petitioner had accepted at least one wager. But such proof would constitute proof of a commission of a Federal offense. There are no exceptions within the Federal jurisdiction, to wit, the District of Columbia, whereby a person is licensed to engage in wagering activities. All such activities are prohibited by Federal law. This Court has repeatedly held that where evidence of the commission of a Federal offense is essential to the imposition of a tax it lacks the ordinary characteristics of a tax and is a penalty and not a legitimate exercise of the taxing power.[15] In the most recent case decided on this point, this Court in *United States* v. *Sanchez*, 340 U.S. 42, 71 S. Ct. 108, 110, in upholding the validity of the Marihuana Tax Act found that tax to be valid because it stated:

> "Second. *The tax levied by Sec. 2590(a)(2) is not conditioned upon the commission of a crime. The tax is on the transfer of marihuana* to a person who has not paid the special tax and registered. *Such a transfer is not made an unlawful act under the statute.* Liability for the payment of the tax rests primarily with the transferee; but if he fails to pay, then the transferor, as here, becomes liable. It is thus the failure of the transferee to pay the tax that gives rise to the liability of the transferor. *Since his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction* . . ." (Italics supplied)

To the contrary in the instant case. It is submitted that the foregoing arguments clearly show the unconstitutionality of the 10% tax as applied to this petitioner in the

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[15] *Lipke* v. *Lederer* 259 U.S. 557, 561-562
*Regal Drug Corp.* v. *Wardell* 260 U.S. 386
*U. S.* v. *LaFranca* 282 U.S. 568, 572

District of Columbia and distinguish this case from Kahriger, *supra*, where the Court upheld the validity of the 10% tax as applied to persons engaged in wagering activities in the states.

It is interesting to note that the United States has not charged this petitioner with failing to pay the 10% tax for which he is liable if the 10% tax section, Section 3285, is constitutional and if the petitioner accepted wagers. By failing to so charge this petitioner, the United States has sought to avoid a determination of the validity of the 10% tax section as applied in the District of Columbia. But this Court in Kahriger recognized the necessity of first passing on the validity of the 10% tax section before passing on the validity of the $50 tax section even though Kahriger, like this petitioner was not charged with violating the 10% tax section.

Following further the rationale of this Court in Kahriger, it is now necessary to turn to the consideration of the $50 tax section, Section 3290, supra, with which provision this petitioner has been charged criminally with failing to comply. Immediately an entirely different situation confronts this Court then it did when it arrived at this point in Kahriger. When this Court turned to a consideration of the $50 tax section in Kahriger, supra, it had theretofore concluded that the 10% tax which is the substance of the Wagering Tax Act was constitutional as applied in the states. Having so found, this Court found nothing offensive in the $50 tax or the registration statement which must accompany its payment stating that all the latter was designed to do was to aid in the collection of the 10% tax. (Kahriger, p. 515) But it has been shown that this petitioner is not under any obligation to pay the 10% tax. Since, however, liability for the payment of the $50 tax required by Section 3290 is predicated on a liability for the 10% tax this petitioner was under no constitutional obligation to pay the $50 tax and register contemporaneously with such payment. That this is true is apparent from a rereading of the $50 tax section which reads as follows:

> "A special tax of $50 per year shall be paid by each person *who is liable for tax under subchapter A* or who is engaged in receiving wagers for or on behalf of any person so liable."

It is obvious that liability for the 10% tax is the *sine qua non* for liability for the $50 tax. T.R. 132, Sec. 325.41 (Pg. 38). Where there is no liability for the 10% tax either by virtue of the exemptions in the 10% tax section or because the 10% tax is unconstitutional as applied in a Federal jurisdiction there is no liability for the $50 tax. Therefore, even if this Court were to adopt the distorted construction of the $50 tax section placed on that section by the Municipal Court of Appeals for the District of Columbia, to wit, that the $50 tax must be paid before the acceptance of a wager, there still would be no violation of that section by this petitioner. This petitioner would not in the future be liable for the 10% tax because it is unconstitutional as applied to him. Therefore, even if the $50 tax section were to be rewritten to provide that a special tax of $50 shall be paid by each person who is going to be liable for the 10% tax, this petitioner still would not be under any constitutional obligation to comply with that provision because he will never be liable for the 10% tax.

There is still an additional reason why this petitioner was not required to pay the $50 tax even if the $50 tax section were to be interpreted to mean that the $50 tax must be paid prior to engaging in the business of accepting wagers. As the Municipal Court for the District of Columbia pointed out (R. 11-12):

> "Even if, for the sake of argument, it were to be admitted that this contention in general is sound, I feel it would fall in the District of Columbia by the virtue of the criminal sanctions that can be imposed under Section 371 of Title 18, U.S.C. For even assuming that the payment of the tax and registering would not compel a confession of past illegal substantive acts, nevertheless if two or more persons conspired to violate any of the anti-gambling provisions of the District of Columbia and in pursuance of that conspiracy one of the

> conspirators applied for a tax stamp, such an act would be an overt act in furtherance of the conspiracy and sufficient to sustain a conviction."

Since, therefore, a distorted construction of the $50 tax section does not render that section applicable to this petitioner, this Court should not distort its plain and obvious meaning as did the lower appellate courts. The lower appellate courts would have this Court read the $50 tax section as follows:

> "A special tax of $50 per year shall be paid by each person * * * "

But the statute contains the words sought to be stricken. Words could not be found which were clearer than those used in this section, namely, that the tax of $50 shall be paid by those liable for the 10% tax which means those who have accepted at least one wager. (T.R. 132, Secs. 325.50, 325.51, 325.52, 325.53, 325.54, Pgs. 39-41) The Congress itself in its committee report affirms this statement for it said:

> "The committee conceives of the occupational tax as an integral part of any plan for the taxation of wagers and as essential to the collection and enforcement of such a tax. Enforcement of a tax on wagers frequently will necessitate the tracing of transactions through complex business relationships, thus requiring the identification of the various steps involved. For this reason, *the bill provides that a person who pays the occupational tax must, as part of his registration, identify those persons who are engaged in receiving wagers for or on his behalf, and, in addition, identify the persons on whose behalf he is engaged in receiving wagers.*" (H. Rep. 586, 82d Cong., 1st Sess., p. 60; S. Rep. 781, 82d Cong., 1st Sess., p. 118) (Italics supplied)

It is submitted that the lower appellate courts misinterpreted the language of this Court at page 515 wherein it stated that Kahriger was not compelled by the registration provisions of the Wagering Tax Act to confess to acts already committed but was merely informed by the statute

that in order to engage in the business of wagering in the future he must fulfill certain conditions. All that this Court could have meant by that statement was that compliance with the registration provisions would not compel Kahriger to admit any violation of any existing Federal law in Pennsylvania nor compel him to admit any violation of state law which he had committed prior to the effective date of the Wagering Tax Act.[16] Therefore, the Federal Government could require Kahriger to pay the $50 tax and register. *But not this petitioner.*

A brief comment is deemed proper with respect to the closing sentence of the Opinion of the United States Court of Appeals for the District of Columbia wherein it said:

> "Of course, Congress may tax what it also forbids." (R. 36)

citing *United States* v. *Statoff*, 260 U.S. 477, as authority. It is submitted that the United States Court of Appeals for the District of Columbia completely misconstrued that language which was taken out of context. In the *Statoff case, supra,* the language set forth at page 480 relies on the case of *United States* v. *Yuginovich*, 256 U.S. 450, 464. But the United States Court of Appeals for the District of Columbia overlooked the fact that the tax that was being referred to was the basic production tax on liquor *whether or not legally or illegally* manufactured. In the Yuginovich case this Court made a point of the fact that liquor could be manufactured for non-beverage purposes (Pg. 480) and all that the National Prohibition Act[17] prohibited was manufacture, etc. of intoxicating liquor for beverage purposes. This Court never upheld the so-called double tax applicable only to illegal manufacture. *Lipke* v. *Lederer*, 259 U.S. 557. This is clearly shown in *United States* v. *One Ford Coupe*, 272 U.S. 321, wherein this Court stated:

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[16] Treasury Reg. 132, Section 325.40 (Pg. 38).

[17] 41 Stat. 305 (Pg. 44).

"With respect to the character of the impositions called taxes there is nothing in either the Revenue Acts or the Prohibition Act which makes any distinction between the product of legal and illegal distillation. The Acts left in effect the basic tax of $2.20 per gallon, which was and is a true tax on the product, whether legally or illegally distilled, and added to it the additional amounts in case of illegal distillation or diversion to illegal uses. These additional amounts also are called taxes by Congress, and were understood by it to be such. Whether they were intrinsically penalties and should be treated as such we need not determine. The basic tax of $2.20 a gallon on liquor illegally produced is not imposed because of illegality, but despite of it. . . ."

This question was further considered in *United States* v. *La Franca*, 282 U.S. 568, wherein this Court stated:

"By § 35, supra, it is provided that upon evidence of an illegal sale under the National Prohibition Act, a tax shall be assessed and collected in double the amount now provided by law. This, in reality, is but to say that a person who makes an illegal sale shall be liable to pay a 'tax' in double the amount of the tax imposed by preexisting law for making a legal sale, which existing law renders it impossible to make. A tax is an enforced contribution to provide for the support of government; *a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act.* The two words are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law is settled by Lipke v. Lederer, 259 U.S. 557, 561-562. See also Regal Drug Corp. v. Wardell, 260 U.S. 386. There is nothing in United States v. One Ford Coupe, 272 U.S. 321, or Murphy v. United States, 272 U.S. 630, to the contrary." (Italics supplied)

It is clear that all that this Court held in the Prohibition Act cases, decided by it and referred to hereinbefore, was that the basic production tax was a true tax in that it applied to the manufacture of liquor which was licensed as well as so-called bootleg whiskey. But this Court also held that where a tax was imposed solely on illegal manufacture, that is bootleg whiskey it no longer was a tax but was a penalty and was not a legitimate exercise of the taxing power. An identical situation exists in the present case inasmuch as the Federal Government has to the fullest extent of its authority wholly prohibited the wagering activity sought to be taxed.

Further, it should not be forgotten that Section 35 of the National Prohibition Act provides in part (Pg. 44):

> "No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance . . ."

The Congress that enacted the National Prohibition Act apparently foreseeing the situation in which this petitioner presently finds himself obviated this situation by eliminating the provision from the old revenue act providing for registration and the payment of tax to be evidenced by revenue stamps. However, the Congress which enacted the Wagering Tax Act apparently did not have that much foresight.

One further point should be called to this Court's attention and that is the fact that the provisions of the Wagering Tax Act contravene the Fourth Amendment. It is submitted that Sections 3275 (Pg. 47) and 3293 (Pg. 30) of Title 26, U.S.C. contravene the provisions of the Fourth Amendment. It is well settled that probable cause for issuing a search warrant is less than proof of guilt.[18] As was stated in the Dumbra case at page 441:

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[18] *Dumbra* v. *United States*, 268 U.S. 435; *Steele* v. *United States*, No. 1, 267 U.S. 498; cf. *Brinegar* v. *United States*, 338 U.S. 160; *Carroll* v. *United States*, 267 U.S. 132.

> "In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant."

Compliance with the provisions of Chapter 27A, supra, would result in a posting by the Collector of Internal Revenue pursuant to the provisions of Section 3275, Title 26, U.S.C. (Pg. 47). This section would require the Collector to post in a conspicuous place in his office, for public inspection, the name of this defendant and the time, place and business for which the special tax was paid. This would immediately put the United States Attorney for the District of Columbia on notice that this defendant was engaged in activities in violation of Federal law in this District, and he could immediately obtain the returns filed and use them in a prosecution against this defendant or at least obtain leads from them whereby he could prosecute him.[19] Further, Section 3293, *supra*, would require this defendant to post the special tax stamp in his place of business under penalty of Federal law if he fails so to do.[20] The contravention of the Fourth Amendment is made quite apparent by this section for the very business for which the special tax stamp is issued and required to be posted is unlawful in the District of Columbia.[21] Since compliance with either or both of the foregoing sec-

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[19] Treas. Dec. 4929, Secs. 463C. 32, 463C. 33, 463C. 34, Pgs. 41-42; Treasury Dec. 5138, Sec. 458. 611. Pg. 43.

[20] Treasury Regs. 132, Section 325. 53. Pg. 41.

[21] *United States* v. *Yuginovich*, *supra*, page 464.

tions would lay a predicate for the issuance of a search warrant, this compulsion constitutes a device to obtain information under the guise of statutory authority so that thereafter the United States could assert "probable cause" for the issuance of a search warrant and subsequently contend that any search or seizure pursuant thereto was valid.

## CONCLUSION

(1) Since the acceptance of wagers in the District of Columbia is wholly prohibited by Federal law, the 10% tax sought to be imposed on each wager accepted by persons engaged in the wagering business is unconstitutional.

(a) This tax contravenes the Fifth Amendment in that compliance with the pertinent provisions compel an admission of the commission of prior Federal crimes during the month in question.

(b) The tax is a penalty in the guise of a tax and not a true tax in that proof of a commission of a Federal crime in the District of Columbia, to wit, the acceptance of a wager is a prerequisite to liability for the 10% tax. Therefore it is not a legitimate exercise of the taxing power.

(c) Since Section 3290, supra, the $50 tax section, only requires those persons liable for the 10% tax to pay the $50 tax and register, this petitioner did not violate the $50 tax section by failing to pay as he was not liable for the 10% tax.

(2) (a) The $50 tax section, Section 3290, supra, is of itself unconstitutional in that it contravenes the Fifth Amendment and also imposes penalties in the guise of a tax as it is grounded on a liability for the 10% tax. As has been shown, to be liable for the 10% tax, at least one wager must be accepted. Therefore, the $50 tax and registration contemporaneous therewith would compel the admission of at least one past Federal crime, to wit, the acceptance of a wager in the District of Columbia.

(b) Even if the $50 tax section, Section 3290, supra, is construed by this Court to require payment of the $50 tax and registration contemporaneous therewith prior to the acceptance of a wager, that Section is still only applicable to persons who in the future will be liable for the 10% tax. In the District of Columbia this petitioner will never be liable for the 10% tax. Therefore, he was not liable for the $50 tax.

(3) Sections 3275 and 3293 contravene the Fourth Amendment in that they are devices to furnish the prosecuting officials with information to assert as a predicate for support of the requirement of "probable cause" required for the issuance of a valid search warrant.

(4) The decision of the United States Court of Appeals for the District of Columbia Circuit in this case if not reversed bestows in advance a judicial blessing on all amendments by the Congress of the United States to existing Federal criminal statutes providing for the imposition of excise taxes on illegal activities as well as requiring each violator of such statutes to file monthly returns confessing Federal crimes. The result would be the deletion of the Fifth Amendment from the Constitution of the United States.

WHEREFORE, this petitioner prays this Court that a Writ of Certiorari be granted because of the serious constitutional questions presented and the importance of these questions in the administration of Federal law generally.

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# APPENDIX

Filed June 10, 1954

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 12009

FRANK LEWIS, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

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Appeal from the Municipal Court of Appeals
for the District of Columbia

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Decided June 10, 1954

*Mr. Walter E. Gallagher*, with whom *Mr. Myron G. Ehrlich* was on the brief, for appellant.

*Mr. Lewis A. Carroll*, Assistant United States Attorney, with whom *Messrs. Leo A. Rover*, United States Attorney, and *Kenneth D. Wood* and *Alexander L. Stevas*, Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, BAZELON and WASHINGTON, Circuit Judges.

PER CURIAM: This is an appeal from a decision of the Municipal Court of Appeals, holding that the occupational tax imposed by Chapter 27A of the Internal Revenue Code, 26 U.S.C. § 3290, (1952), on the business of accepting wagers, is constitutional in its application to the District of Columbia. *United States* v. *Lewis*, 100 A.2d 40 (D.C. Mun. App. 1953). That decision is clearly correct, in view of *United States* v. *Kahriger*, 345 U.S. 22, rehearing denied, 345 U.S. 931 (1953). "Of course Congress may tax what it also forbids." *United States* v. *Stafoff*, 260 U.S. 477 at 480 (1923).

*Affirmed.*

Filed June 10, 1954

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

April Term, 1954.

No. 12009

FRANK LEWIS, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the Municipal Court of Appeals
for the District of Columbia

Before EDGERTON, BAZELON and WASHINGTON, Circuit Judges.

**Judgment**

This cause came on to be heard on the transcript of the record from the Municipal Court of Appeals, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Municipal Court of Appeals appealed from in this cause be, and the same is hereby, affirmed.

Dated: June 10, 1954.

Per Curiam.

**Act of October 20, 1951, c. 521, Title IV, § 471 (a), 65 Stat. 529. Title 26 U.S.C. §§ 3285 et seq., Chap. 27A Internal Revenue Code. (Wagering Tax Act)**

"CHAPTER 27A—WAGERING TAXES

"SUBCHAPTER A—TAX ON WAGERS

"SEC. 3285. Tax.

"(a) Wagers. There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

"(b) Definitions. For the purposes of this chapter—

"(1) The term 'wager' means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

"(2) The term 'lottery' includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) Amount of wager. In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

"(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers

placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

"(e) Exclusions from tax. No tax shall be imposed by this subchapter (1) on any wager placed, with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267.

"(f) Territorial extent. The tax imposed by this subchapter shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (A) with a person who is a citizen or resident of the United States, or (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States.

"SEC. 3286. Credits and Refunds.

"(a) No overpayment of tax under this subchapter shall be credited or refunded (otherwise than under subsection (b)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Secretary, (1) that he has not collected (whether as a separate charge or otherwise) the amount of the tax from the person who placed the wager on which the tax was imposed, or (2) that he has repaid the amount of the tax to the person who placed such wager, or unless he files with the Secretary written consent of the person who placed such wager to the allowance of the credit or the making of the refund. In the case of any laid-off wager, no overpayment of tax under this subchapter shall be so credited or refunded to the person with whom such laid-off wager was placed unless he establishes, in accordance with regulations prescribed by the Secretary, that the provisions of the preceding sentence have been complied with both with respect to the person who placed the laid-off wager with him and with respect to the person who placed the original wager.

"(b) Where any taxpayer lays off part or all of a wager with another person who is liable for tax under this subchapter on the amount so laid off, a credit against the tax

imposed by this subchapter shall be allowed, or a refund shall be made to, the taxpayer laying off such amount. Such credit or refund shall be in an amount which bears the same ratio to the amount of tax which such taxpayer paid under this subchapter on the original wager as the amount so laid off bears to the amount of the original wager. Credit or refund under this subsection shall be allowed or made only in accordance with regulations prescribed by the Secretary; and no interest shall be allowed with respect to any amount so credited or refunded.

"SEC. 3287. Certain provisions made applicable.

"All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax imposed by this subchapter. In addition to all other records required pursuant to section 2709, each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable.

"Subchapter B—Occupational Tax.

"SEC. 3290. Tax.

"A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.

"SEC. 3291. Registration.

"(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

"(1) his name and place of residence;

"(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

"(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter

A, the name and place of residence of each such person.

"(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

"(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

"SEC. 3292. Certain provisions made applicable.

"Sections 3271, 3273(a), 3275, 3276, 3277, 3279, and 3280 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation described in chapter 27. No other provision of subchapter B of chapter 27 shall so extend or apply.

"SEC. 3293. Posting.

"Every person liable for special tax under this subchapter shall place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person, and exhibit it, upon request, to any officer or employee of the Bureau of Internal Revenue.

"SEC. 3294. Penalties.

"(a) Failure to pay tax. Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

"(b) Failure to post or exhibit stamp. Any person who, through negligence, fails to comply with section 3293, shall be liable to a penalty of $50, and the cost of prosecution. Any person who, through willful neglect or refusal, fails to comply with section 3293, shall be liable to a penalty of $100, and the cost of prosecution.

"(c) Willful violations. The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter.

"Subchapter C—Miscellaneous Provisions.

"SEC. 3297. Applicability of Federal and State Laws.

"The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

"SEC. 3298. Inspection of Books.

"Notwithstanding section 3631, the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter."

(b) Technical amendment. Section 3310(f) (relating to discretion allowed the Commissioner with respect to returns and payment of tax)[53] is hereby amended by inserting after "subchapter A of chapter 25," the following: "subchapter A of chapter 27A,".

SEC. 472. EFFECTIVE DATE OF PART VII.

The tax imposed by subchapter A of chapter 27A, as added by section 471, shall apply only with respect to wagers placed on or after the first day of the first month which begins more than 10 days after the date of enactment of this Act. No tax shall be payable under subchapter B of chapter 27A, as added by section 471, with respect to any period prior to the first day of the first month which begins more than 10 days after the date of enactment of this Act. In the case of any person who is liable for tax under subchapter A of chapter 27A, as added by section 471, or who is engaged in receiving wagers for or on behalf of any person so liable, and who commenced the activity which makes him subject to such tax, or who was engaged in receiving such wagers, prior to the first day of the first month specified in the preceding sentence, the tax under

[53] U.S.C.A. § 3310(f).

subchapter B of chapter 27A, as added by section 471, shall be reckoned proportionately from the first day of such month to and including the thirtieth day of June following and shall be due on, and payable on or before, the last day of the month specified in the preceding sentence."

**Act of March 3, 1901, 31 Stat. 1330, ch. 854, § 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, § 1, Title 22, D.C. Code, Sec. 1501:**

LOTTERIES—PROMOTION—SALE OR POSSESSION OF TICKETS.

If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

**Act of April 5, 1938, 52 Stat. 198, ch. 72, § 2, Title 22, D. C. Code, Sec. 1502:**

If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or

adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both.

**Act of March 3, 1901, 31 Stat. 1330, ch. 854, § 864, Title 22, D. C. Code, Sec. 1503.**

If any person shall knowingly permit, on any premises under his control in the District, the sale of any chance or ticket in or share of a ticket in any lottery or policy lottery, or shall knowingly permit any lottery or policy lottery, or policy shop on such permises, he shall be fined not less than fifty dollars nor more than five hundred dollars, or be imprisoned not more than one year, or both.

**Act of March 3, 1901, 31 Stat. 1331, ch. 854, § 869; May 16, 1908, 35 Stat. 164, ch. 172, § 3, Title 22, D. C. Code, Sec. 1508.**

It shall be unlawful for any person or association of persons to bet, gamble, or make books or pools on the result of any trotting or running race of horses, or boat race, or race of any kind, or on any election, or any contest of any kind, or game of baseball. Any person or association of persons violating the provisions of this section shall be fined not exceeding five hundred dollars or be imprisoned not more than ninety days, or both.

**Constitution of the United States**
**Amendment IV—Searches and Seizures**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

" * * * nor shall be compelled in any criminal case to be a witness against himself * * *."

**Act of June 25, 1948, c. 645, 62 Stat. 701, U.S.C. Title 18, § 371.**

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

53 Stat. 395, Title 26, U. S. C. § 3275.

§ 3275. List of special taxpayers for public inspection.

(a) In collector's office. Each collector shall, under regulations of the Commissioner, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality, he shall furnish a certified copy thereof, as of a public record, for which a fee of $1 for each one hundred words or fraction thereof in the copy or copies so requested, may be charged.

53 Stat. 394, Title 26, U. S. C. § 3271.

**Treasury Regulations 132, relating to excise and special tax on wagering under Chapter 27A of the Internal Revenue Code (Part 325 of Title 26), Codification of Federal Regulations, and as amended July 16, 1952.**

"SEC. 325.21. Scope of tax . . .

" (b) *A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers* with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted. It is not intended that to be engaged in the business of accepting wagers a person must be either so engaged to the exclusion of all other activities or even primarily so engaged. Thus, for example, an individual may be primarily engaged in business as a salesman, and also for the purpose of the tax be engaged in the business of accepting wagers." (Emphasis supplied)

"SEC. 325.24. Person liable for tax. (a) Every person engaged in the business of accepting wagers with respect to a sports event or a contest is liable for the tax on any such wager accepted by him. Every person who operates a wagering pool or lottery conducted for profit is liable for the tax with respect to any wager or contribution placed in such pool or lottery. To be liable for the tax, it is not necessary that the person engaged in the business of accepting wagers or operating a wagering pool or lottery physically receive the wager or contribution. Any wager or contribution received by an agent or employee on behalf of such person shall be considered to have been accepted by and placed with such person.

"(b) If a person engaged in the business of accepting wagers or conducting a lottery or betting pool for profit lays off all or part of the wagers placed with him with another person engaged in the business of accepting wagers or conducting a betting pool or lottery for profit, he shall, notwithstanding such lay-off, be liable for the tax on the wagers or contributions initially accepted by him. See section 325.34 for the credit and refund provisions applicable with respect to laid-off wagers."

**Treas. Regs. 132, Section 325.25(a), "When tax attaches" reads as follows:**

"SEC. 325.25. When tax attaches.

"(a) The tax attaches when (1) a person engaged in the business of accepting wagers with respect to a sports event or a contest, or (2) a person who operates a wagering pool or lottery for profit, *accepts a wager or contribution from a bettor.* In the case of a wager or credit, the tax attaches whether or not the amount of the wager is actually collected from the bettor." (Emphasis supplied)

Treasury Reg. 132, Sec. 325.30. Returns.

(a) Every person required to pay the tax on wagers imposed by section 3285 of the Code shall prepare each month from the daily records required by section 325.32 a return, in duplicate, on Form 730 in accordance with the instructions thereon. The original return, together with the amount of the tax, shall be filed with the collector of internal revenue for the district in which is located the office or principal place of business of the person required to make the return. If such person resides in the United States, but has no office or principal place of business in the United States, the return shall be filed with the collector of internal revenue for the district in which he resides. If such person has no office, residence, or principal place of business in the United States, the return shall be filed with the Collector at Baltimore, Maryland. The return shall be filed on or before the last day of the month following that for which it is made.

(b) When the last day of the month in which a return and payment are due falls on Sunday or a legal holiday, the return may be filed and payment made on the next secular or business day. A return shall be forwarded to the collector for each month whether or not any liability has been incurred for that month. If a taxpayer ceases operations which make him liable for tax, the last return shall be marked "Final Return".

Treasury Reg. 132, Sec. 325.31. Payment of Taxes.

All taxes are due and payable to the collector of internal revenue, without assessment by the Commissioner or notice from the collector, at the time fixed for filing the return. If the tax is not paid when due, there shall be added as part

of the tax interest at the rate of 6 percent per annum from the time the tax became due to the actual date of payment or assessment, whichever is earlier. For provisions with respect to interest generally, including interest on assessments, see section 325.36.

Treasury Reg. 132, Sec. 325.32. Records.

(a) In general. (1) Every person required to pay the excise tax imposed by section 3285 shall keep, or cause to be kept, at his office or principal place of business, or, if he has no office or principal place of business, at his residence or some other convenient or safe location, such records as will clearly show as to each day's operation:

(A) The gross amount of all wagers accepted;

(B) The gross amount of each class or type of wager accepted on each separate event, contest, or other wagering medium. For example, in the case of wagers accepted on a horse race, the daily record shall show separately the gross amount of each class or type of wagers (straight bets, parlays, "if" bets, etc.) accepted on each horse in the race. Similarly, in the case of the numbers game, the daily record shall show the gross amount of each class or type of wagers accepted on each number;

(C) Separately, the gross amount of wagers—

(i) accepted directly by the taxpayer or at any registered place of business of the taxpayer (other than laid-off wagers),

(ii) accepted for his account by agents at any place other than a registered place of business of the taxpayer (other than laid-off wagers), and

(iii) accepted as laid-off wagers from persons subject to the excise tax;

(D) With respect to wagers laid off with others, the name, address, and registration number of each person with whom the laid-off wagers were placed, and the gross amount laid off with each such person, showing separately the gross amount of laid-off wagers with respect to each event, contest, or other wagering medium. For example, the daily record shall show the gross amount laid off on each horse in a race; and

(E) The gross amount of tax collected from or charged to bettors as a separate item.

(2) If a taxpayer has any agents or employees receiving wagers on his behalf, he shall maintain a separate record showing the name and address of each agent or employee, the period of employment, and the number of the special tax stamp issued to each such agent or employee.

(3) A duplicate copy of each return required by section 325.30 shall be retained as part of the taxpayer's records.

(b) Period for retaining records. The records required by this section shall, at all times, be open for inspection by internal revenue officers, and they shall be maintained for a period of at least four years from the date the tax became due.

"SEC. 325.40. Effective date of tax. The special tax imposed by section 3290 of the Internal Revenue Code is effective on and after November 1, 1951.

"SEC. 325.41. Persons liable for tax. Every person who is liable for the 10 percent excise tax imposed on wagers by section 3285 of the Internal Revenue Code and every person who is engaged in receiving wagers for or on behalf of any other person so liable is liable for the special tax.

*Example (1).* A is engaged in the business of accepting horse race bets. He employs ten persons to receive on his behalf wagers which are transmitted by telephone. He also employs a secretary and bookkeeper.

A and each of the ten persons who receive wagers by telephone are liable for the special tax. The secretary and bookkeeper are not liable unless they also receive wagers for A.

*Example (2).* B operates a numbers game. He has an arrangement with ten persons, who are employed in various capacities, such as bootblacks, elevator operators, news dealers, etc., to receive wagers from the public on his behalf. B also employs a person to collect from his agents the wagers received on his behalf.

B, his ten agents, and the employee who collects the wagers received on his behalf are each liable for the special tax.

SEC. 325.42. Rate and computation of tax. (a) A tax of $50 per year is imposed upon each person liable for the tax. A person engaged both in accepting wagers on his own account and in receiving wagers for or on behalf of some other person is required to purchase but one special tax stamp.

(b) The tax year begins July 1 and ends June 30. Persons commencing business between August 1 and June 30 (both dates inclusive) shall pay a proportionate part of the annual tax. "Commencing business" means the initial acceptance of a wager by a person liable for the 10 percent excise tax or the initial receiving of a wager by an agent or employee for or on behalf of some other person. Persons in business for only a portion of a month are liable for tax for the full month, i.e., a person first becoming subject to the special tax on, for example, the 20th day of a month, is liable for tax for the entire month. As the tax became effective on November 1, 1951, persons in business on that date or commencing business during that month are liable for the tax for the eight months of the year ending the following June 30.

SEC. 325.50. Registry, return, and payment of tax. (a) Every person engaging in the business of accepting wagers and liable to the 10 percent excise tax imposed by section 3285 of the Internal Revenue Code (see section 325.24 of these regulations) and every person engaged in receiving wagers for or on behalf of any person so liable shall on or before the last day of the month in which business is commenced file a return on Form 11-C. The return shall be filed with the collector of internal revenue for the district in which is located the taxpayer's office or principal place of business. If such taxpayer resides in the United States, but has no office or principal place of business in the United States, the return shall be filed with the collector of internal revenue for the district in which he resides. If the taxpayer has no office, residence, or principal place of business in the United States, the return shall be filed with the Collector of Internal Revenue, Baltimore, Md. The collector, upon request, will furnish to the taxpayer the proper forms which shall be filled out and signed as indicated therein.

(b) Every person engaged on November 1, 1951, in any business which makes him subject to the special tax, or

first engaging in such business during the month of November 1951, shall register and file a return on Form 11-C and pay the tax on or before November 30, 1951. Thereafter, such person shall register, file a return, and pay the tax on or before the last day of July of each year.

(c) Each return shall show the taxpayer's full name. A person doing business under an alias, style, or trade name shall give his true name, followed by his alias, style, or trade name. In the case of a partnership, association, firm, or company, other than a corporation, the style or trade name shall be given, also the true name of each member and his place of residence. In the case of a corporation, the true name and title of each officer and his place of residence shall be shown.

(d) Each person engaged in the business of accepting wagers on his own account shall furnish the name and address of each place where such business is conducted, together with the true name and residence address of each agent or employee accepting wagers on his behalf. Each agent or employee of a person accepting wagers shall furnish the name and residence address of each person (i.e., individual, partnership, corporation, etc.) on whose behalf such wagers are accepted.

SEC. 325.51. Records of agent or employee. Every person who is engaged in receiving wagers of a type described in section 325.21 for or on behalf of another person (at any place other than a registered place of business of such other person), shall keep a record showing for each day (1) the gross amount of such wagers received by him, (2) the amount, if any, retained as a commission or as compensation for receiving such wagers and (3) the amount turned over to the person on whose behalf the wagers were received, and the name and address of such person. The records required by this section shall, at all times, be open for inspection by internal revenue officers, and they shall be maintained for a period of at least four years from the date the wager was received.

"SEC. 325.52. Tax payment evidenced by special tax stamp. (a) Upon receipt of a return, on Form 11-C, together with remittance of the full amount of tax due, the collector will issue a special tax stamp as evidence of payment of the special tax. Such payment shall be made only

in the form of cash, certified check, cashier's check, or money order.

(b) Collectors will distinctly write or print on the stamp before it is delivered or mailed to the taxpayer the following information: (1) the taxpayer's registered name, and (2) the business or office address of the taxpayer if he has one; if not, the residence address. Special tax stamps will be transmitted by ordinary mail, unless it is requested that they be transmitted by registered mail, in which case additional cost to cover registry fee shall be remitted with the return.

(c) Collectors and their deputies are forbidden to issue receipts in lieu of stamps representing the payment of special taxes."

SEC. 325.53. Special tax stamp to be posted. The special tax stamp issued to a taxpayer as evidence of the payment of the tax shall be kept posted conspicuously in his principal place of business, except that if he has no such place of business he shall keep such stamp on his person and exhibit it, upon request, to any officer or employee of the Bureau of Internal Revenue. Any person who, through negligence, fails to post the special tax stamp in his principal place of business, or who fails to keep the special tax stamp on his person in the event he has no business address, shall be liable to a penalty of $50 and the cost of prosecution. If through willful neglect or refusal, any person fails to comply with the provisions of section 3293, he shall be liable to a penalty of $100 and the cost of prosecution.

SEC. 325.54. Certificates in lieu of stamps lost or destroyed. When a special tax stamp has been lost or destroyed, such fact shall be reported to the collector at once for the purpose of obtaining from him a certificate of payment. Such certificate shall be posted in place of the stamp; otherwise liability as above indicated for failure to post the stamp will be incurred. (See section 325.53.)

**Treasury Decision 4929, Page 96 of the Internal Revenue Cumulative Bulletin:**

"Section 463C.32. Treasury Department officers and Employees.—The officers and employees of the Treasury Department whose official duties require inspection of

returns may inspect any such returns without making a special written application. If the head of a bureau or office in the Treasury Department, not a part of the Internal Revenue Bureau, desires to inspect or to have an employee of his bureau or office inspect a return in connection with some matter officially before him for information other than tax purposes, the inspection may, in the discretion of the Secretary, be permitted upon written application to him by the head of such bureau or office, showing in detail why the inspection is desired.

"Section 463C.33. Inspection by Branch of Government Other Than Treasury Department.—Except as provided in Section 463C.34, if the head of an executive department (other than the Treasury Department), or of any other establishment of the United States Government desires to inspect or to have some other official or employee of his branch of the service inspect a return in connection with some matter officially before him, the inspection may, in the discretion of the Secretary of the Treasury, be permitted upon written application to him by the head of such executive department or other government establishment. The application shall be signed by such head and shall show in detail why the inspection is desired, the name and address of the taxpayer who made the return, and the name and official designation of the person who is desired to inspect the return. The information obtained under this section and Section 463C.32 may be used as evidence in any proceeding conducted by or before any department or establishment of the United States, or to which the United States is a party.

"Section 463C.34. Inspection by Government Attorneys. Any return shall be opened to inspection by a United States Attorney or by an attorney of the Department of Justice where necessary in the performance of his official duties. The request for inspection shall be in writing and, except as provided in Section 463C.37, shall be addressed to the Commissioner and shall state the purpose for which inspection is desired. It may be signed by the Attorney General, the Assistant to the Attorney General, an Assistant Attorney General, or a United States Attorney."

**Treasury Decision 5138, Internal Revenue Cumulative Bulletin, 1942-17-11074, Page 99:**

"Section 458.611. Inspection of Excise Tax Returns. Pursuant to the above-mentioned provisions of law, excise tax returns filed with respect to any tax imposed by Chapters 7 or 12 or 21, of Subchapter A of Chapter 29 or Chapter 30 of the Internal Revenue Code, or filed after June 16, 1933 with respect to any tax imposed by Title IV, V, or VII of the Revenue Act of 1932, or filed with respect to the tax imposed by Title IV of the Revenue Act of 1934; or by any of the above-mentioned provisions as amended, shall be open to inspection to the same extent as provided with respect to tax returns in Subpart B, and Sections 463C.31, 463C.32, 463C.33(a), 463C.34, 463C.35, 463C.36 and 463C.37 of Subpart D of Treasury Decision 4929, approved August 28, 1939 (C.B. 1939-2, 91), as amended by Treasury Decision 4991, approved July 20, 1940 (C.B. 1940-2, 92) (26 C.F.R. 1939 Sup., 458.301 to 458.307, inclusive; 458.33 to 458.337, inclusive, 1940 Sup. 458.333(a))."

**53 Stat. 394, Title 26, U.S.C., Section 3271**

§ 3271. Payment of tax

(a) Condition precedent to doing business. No person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor in the manner provided in this chapter.

(b) Due date. All special taxes shall become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year, and in the latter case it shall be reckoned proportionately, from the 1st day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

(c) How paid

(1) Stamp. All special taxes imposed by law, including the tax on stills or worms, shall be paid by stamps denoting the tax.

(2) Assessment

**Title II. Section 3. National Prohibition Act.**

"Section 3. No person shall on or after the date when the 18th Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. Liquor for non-beverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the Commissioner may, upon application, issue permits therefore: . . ."

"Section 6. No one shall manufacture, sell, purchase, transport or prescribe any liquor without first obtaining a permit from the Commissioner so to do except that the person may without a permit purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided and except that any person who in the opinion of the Commissioner is conducting a bona fide hospital or sanitarium engaged in the treatment of persons suffering from alcohol may under such rules, regulations and conditions as the Commissioner shall prescribe, purchase and use in accordance with the methods and use in such Institution, liquor, to be administered to the patients of such Institution under the direction of a duly qualified physician employed by such Institution * * * Nothing in this Title shall be held to apply to the manufacture, sale, transportation, importation, possession or distribution of wine for sacramental purposes or like religious rites."

"Section 35. * * * No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance * * * "

**Article I. Section 8. Clause 17. United States Constitution**

"Section 8, Clause 17. Seat of government.

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States."

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FORM 730
Treasury Department
Internal Revenue Service

# TAX ON WAGERING

(Section 3285 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) ..... (Date) .....

(Title) .....
(Owner, president, partner, member, etc.)

(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)... $.....
2. Gross amount of lay-off wagers accepted during month (See instruction 3)..... $.....
3. Sum of items 1 and 2..... $.....
4. Tax (10 percent of item 3)..... $.....
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4 (*a*) and (*b*))..... $.....
6. Net tax due (item 4 less item 5)..... $.....

MONTH

Penalty... $.....

Interest... $.....

Total due. $.....

ORIGINAL RETURN.—This form must be filed, with remittance, with the Collector of Internal Revenue.

IMPORTANT.—Follow instructions carefully.

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FORM 730
Treasury Department
Internal Revenue Service

# TAX ON WAGERING

(Section 3285 of the Internal Revenue Code)

This copy should be carefully preserved by the taxpayer at his place of business as a part of his records, and should at all times be available for inspection by officers of the Bureau of Internal Revenue. See paragraph "Records" under instructions.

IMPORTANT.—Return with remittance should be sent to the Collector of Internal Revenue for your district and NOT to the Commissioner of Internal Revenue at Washington, D. C. Checks or money orders should be made payable to the Collector of Internal Revenue. (See instructions, par. 2, on reverse of form.) If you have nothing to report, make notation to that effect on this form and return to the Collector of Internal Revenue. If final return is filed, the return should be marked "FINAL RETURN."

(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)... $.....
2. Gross amount of lay-off wagers accepted during month (See instruction 3)..... $.....
3. Sum of items 1 and 2..... $.....
4. Tax (10 percent of item 3)..... $.....
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4 (*a*) and (*b*))..... $.....
6. Net tax due (item 4 less item 5)..... $.....

MONTH

Penalty... $.....

Interest... $_____

Total due. $.....

DUPLICATE RETURN.—Do not send to the Collector of Internal Revenue. IMPORTANT.—Follow instructions carefully.

16—68801-1

## INSTRUCTIONS

**(For full instructions see Regulations 132)**

1. LAW.—The Internal Revenue Code imposes a tax upon wagers accepted on or after November 1, 1951.

Section 3285. Tax.—

(a) *Wagers.*—There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) *Definitions.*—For the purposes of this chapter—

(1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) *Amount of wager.*—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) *Persons liable for tax.*—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

(e) *Exclusions from tax.*—No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267.

(f) *Territorial extent.*—The tax imposed by this subchapter shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (A) with a person who is a citizen or resident of the United States, or (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States.

2. RETURNS AND PAYMENT OF TAX.—All taxes are due and payable without any assessment by the Commissioner or notice from the collector. Return, with remittance, covering the tax due under section 3285 for any calendar month must be in the hands of the collector of internal revenue (or his authorized representative) for the district in which the office or principal place of business of the taxpayer is located (or if he has no office or principal place of business in the United States, the Collector at Baltimore, Maryland), on or before the last day of the succeeding month; however, the Commissioner has authority under the law to require the immediate filing of a return and payment of the tax, when such action becomes necessary.

3. LAY-OFF WAGERS.—A taxpayer who accepts a lay-off wager from another taxpayer shall report such amount in item 2 of the return

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(p. 46 bottom)

and shall retain a copy of the certificate furnished the taxpayer making the lay-off wager.

4. CREDITS—(*a*) *General credits.*—Any person who overpays the tax due with one monthly return may take credit for the overpayment against the tax due with any subsequent monthly return. If a credit is taken, a statement fully explaining the reason such credit is claimed must be attached to the return. This statement should also show whether any previous claim for credit or refund covering the amount involved, or any part thereof, has been filed; and should list each amount making up the total of the credit, monthly return on which reported, date of payment and, if the tax was paid with respect to more than 1 month, the exact amount of the credit chargeable to each month. A complete and detailed record of all credits must be kept by the taxpayer for a period of at least 4 years from the date the credit was taken. No credit shall be allowed, however (except as provided in the succeeding paragraph), whether in pursuance of a court decision or otherwise, unless the taxpayer establishes (1) that he has not collected the tax either as a separate charge or as part of the wager with respect to which it was imposed, or (2) that he has repaid the amount of the tax to the person making the wager or has secured the written consent of such person to the allowance of the credit. If the credit relates to overpayment of tax with respect to a laid-off wager, the taxpayer must also establish that the tax was not collected by any person, and if collected, that the tax has been refunded to the person who placed the wager originally, or that he has secured the written consent of such person to the allowance of the claim.

(*b*) *Lay-off credits.*—Under section 3286 (b) a credit may be allowed a taxpayer for tax paid by him or tax due with respect to any wager, if such wager was laid off with another taxpayer who is liable for tax with respect to such laid-off wager. If such a credit is taken, the taxpayer must attach to the return a statement fully explaining the reason such credit is claimed. This statement should also show whether any previous claim for credit or refund covering the amount involved, or any part thereof, has been filed; and should list each amount making up the total of the credit, monthly return on which reported, date of payment and, if the tax was paid with respect to more than 1 month, the exact amount of the credit chargeable to each month. In addition, there must be attached to the return certificates in the form prescribed in Regulations 132. A complete and detailed record of all credits must be kept by the taxpayer for a period of at least 4 years from the date the credit was taken. No interest is to be allowed with respect to any such credit.

A claim for refund may be filed in any case where a credit may be taken. If claim for refund is filed, the evidence required in the case of a credit must be submitted with the claim for refund.

5. RECORDS.—Records shall contain sufficient information to enable the Commissioner to determine the taxability of the transactions and the amount of tax due, and shall at all times be open to the inspection of internal-revenue officers. Such records, including duplicate copies of returns, shall be kept for a period of at least 4 years from the date the tax is due.

6. PENALTIES AND INTEREST.—Failure to file on time: 5 percent of the tax if the failure is for not more than 30 days, with an additional 5 percent for each additional 30 days or fraction thereof during which the delinquency continues, not to exceed 25 percent in the aggregate. Failure to pay on time before assessment, interest at the rate of 6 percent per annum. Failure to pay within 10 days after issuance of notice and demand based on assessment approved by Commissioner, 5 percent penalty and interest on assessment at rate of 6 percent per annum. Severe penalties for willful failure to pay tax, keep records, file returns, or for false or fraudulent returns are imposed by the Internal Revenue Code.

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26 USC 3275 List of special taxpayers for public inspection

(a) In collector's office. Each collector shall, under regulations of the Commissioner, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality, he shall furnish a certified copy thereof, as of a public record, for which a fee of $1 for each one hundred words or fractions thereof in the copy or copies so requested, may be charged.

IN THE

# Supreme Court of the United States

October Term, 1954

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No. 203

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FRANK LEWIS, *Petitioner*

v.

UNITED STATES OF AMERICA

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## REPLY BRIEF FOR PETITIONER

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## CASES



## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

IN THE

# Supreme Court of the United States

October Term, 1954

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No. 203

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FRANK LEWIS, *Petitioner*

v.

UNITED STATES OF AMERICA

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## REPLY BRIEF FOR PETITIONER

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The United States by revising the "Questions Presented" as set forth in the Petitioner's main brief at pages 2-3 has endeavored to divert this Court's attention from the most important argument advanced by the petitioner in his main brief. That argument is that the 10% tax provision of the Wagering Tax Act (Sec. 3285, Title 26 U.S.C.) is of itself unconstitutional for several reasons when sought to be applied in the District of Columbia and, therefore, this petitioner was not required to pay the $50 tax and register pursuant to the provisions of the Wagering Tax Act (Secs. 3290-3291, Title 26 U.S.C.) since liability for the 10% tax is a sine qua non for liability for the $50 tax. By its revision of the "Questions Presented", particularly question

, page 2 of its brief, the United States would have this 'ourt believe that this petitioner's only objection to the ayment of the $50 tax is that such a payment in the Dis- rict of Columbia would tend to incriminate him of viola- ions of Federal law. While it is true that this is one of he arguments advanced by the petitioner in his main brief, t is neither the only argument nor the most important one. The most important question for this Court to decide s whether or not the 10% tax is invalid as applied to per- ons in the District of Columbia for if it is invalid then his petitioner was under no obligation to pay the $50 tax. The United States has deliberately evaded any discussion f the validity of the 10% tax section. But in so doing, the Jnited States has made a fatal admission. At page 8 of ts Brief the United States states:

> ". . . It is apparent from an integrated reading of the statute that the $50 occupational tax is payable prospectively and before any wager is negotiated, *while the 10% tax is retrospective, and is levied on the gains of past activities . . .*" (Emphasis supplied)

The fact that the 10% tax is retrospective and is levied n the gains of past activities is the reason that the 10% ax is unconstitutional and not valid as applied to this peti- ioner in the District of Columbia. All of the arguments dvanced by the United States in its attempt to sustain the alidity of the $50 tax without reference to the 10% tax re predicated on its interpretation of the Wagering Tax ct whereby it concludes that the $50 tax is valid because t must be paid before any wager is accepted or, in other ords, before any Federal crime committed. This endeavor o put a distorted construction on the $50 tax section is to void the obvious conclusion that if the $50 tax is not owing nd due until after the acceptance of a wager, its payment nd registration would tend to incriminate this petitioner n the District of Columbia and further would also constitute penalty in the guise of a tax. It is this same rationale,

however, which compels the conclusion that the 10% tax is unconstitutional as applied in the District of Columbia as it pertains only to *past activities*, that is to say it applies only to wagers which have been accepted. Therefore, to compel the filing of Form 730 (Main Brief, pages 45-46) would contravene the provisions of the Fifth Amendment for that Form would compel a confession of the commission of Federal crimes in the District of Columbia, to wit, that wagers had been accepted in violation of Federal law prohibiting the acceptance of wagers. Further, since the 10% tax applies only to past activities which are wholly prohibited by Federal law in the District of Columbia (Footnote 1, petitioner's main brief) the 10% tax is in fact a penalty in the guise of a tax and not a true tax. Since therefore this petitioner was not subject to the 10% tax, he was not obligated to pay the $50 tax.

In its endeavor to advance some argument in contravention of this petitioner's contentions, the United States has indulged in the most puerile reasoning at page 7 of its brief wherein it states:

> "No one forced petitioner to engage in the wagering business. When he elected to remain in the business he did so with full knowledge that the Federal Government had imposed a tax on this occupation. He could not elect to remain in the business and reject the tax burdens which Congress had placed upon it. . . ."

The absurdity of this argument is manifest at a moment's reflection. If this argument is valid it would apply to all other activities which are prohibited by Federal law. For example, no one is forced to engage in robbing banks, robbing the mails, transporting stolen motor vehicles in interstate commerce and the like. But even a layman would instantly realize that persons who have committed such Federal crimes could not legally be required to file a report with the Federal Government stating that such Federal crimes had been committed and be required to pay excise taxes for engaging in such wholly prohibited activities. Seeking some

legalistic support for the foregoing absurd contention, the United States at page 7 of its brief quotes from 8 Wigmore, as follows:

> "[T]here is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in future be criminal at the choice of the party reporting."

But the foregoing language has no application in the instant case. First of all Form 730 which must be filed monthly contemporaneously with the payment of the 10% tax is not a future report on future acts. It is a report as to past acts and does compel self-incrimination in contravention of the Fifth Amendment. Further, even assuming arguendo that liability for the 10% tax is not the sine qua non for liability for the $50 tax and that payment of the $50 tax and registration must precede engaging in the business of accepting wagers, the registration statement required to be filed by the Wagering Tax Act, is itself not a future report on a class of future acts, among which a particular one may or may not in the future be criminal at the choice of the party reporting. Even under the foregoing premise such a registration statement would be a future report on a class of acts all of which are crimes under Federal law in the District of Columbia as the party reporting has no choice as to whether or not the acceptance of wagers is or is not criminal. Nor do the *Shapiro* and *Davis* cases cited by the United States in its Brief at page 11 in any wise support the United States' contentions. In those cases the records which were required to be kept were records as to activities which had not been made illegal under any Federal law and it was only because of malfeasance by the parties concerned in the operation of the activities and the keeping of the required records that any crime was committed. Further, such persons were not required to file monthly reports confessing their crimes nor were they required to pay penal-

ties in the guise of excise taxes on their activities. To the contrary in the instant case where the activities which are sought to be taxed are wholly prohibited.

At page 9 of its Brief in footnote 2 the United States endeavors to support its contention that payment of the $50 tax and registration contemporaneous therewith must precede the acceptance of wagers by citing Section 3271, Title 26, U.S.C. and Treasury Regulation 132, Section 325.50. But as this petitioner pointed out in his main brief (page 13) and as is clear from a reading of Treasury Regulation 132, Section 325.42 (Petitioner's main brief, page 39), the words "commencing business" as used in Section 3271, supra, mean "The initial acceptance of a wager by a person liable for the 10% tax. . . ." In other words a person has not "commenced business" until he has accepted at least one wager. Therefore, under Subsection (b) of Section 3271, supra, the special $50 tax cannot be owing and due until the acceptance of at least one wager and its payment cannot be compelled until that time. Thus, the payment of the $50 tax after the acceptance of initial wager would constitute the payment of the special tax *in the manner provided in the chapter.* However, compelling the filing of a statement admitting that a wager had been accepted would contravene the Fifth Amendment and would also render the tax invalid in that it would be a penalty in the guise of a tax. Further reference should be made to Treasury Regulation 132, Section 325.50 cited by the United States in footnote 2 at page 9 of its brief. This section in substance provides that no one shall engage in the business of accepting wagers *subject to the 10% excise tax,* until he has filed a return and paid the special $50 tax. However, it should be noted that the Bureau of Internal Revenue necessarily limits this requirement to those *subject to the 10% excise tax.* But as has been pointed out hereinbefore in this brief and in petitioner's main brief, this petitioner is not and will not be subject to the 10% tax. Also, at the time that the Bureau of Internal Revenue amended Section 325.50 it also

released a Press Release explaining this amended regulation. That release provides in part as follows:

> "The Commissioner in a Press Release dated August 29, 1952, explained the amended regulations at ¶ 42,812 as follows:
>
> "Tighter regulations for the enforcement of the wagering tax law will go into effect Monday, September 1, Commissioner Dunlap announced today.
>
> "Under the new rules, gamblers who are liable for the $50 special Federal occupational tax must purchase their stamps before engaging in any taxable wagering activity. *Previous regulations allowed bookmakers, policy operators, their agents and employees until the end of the month in which they first commenced business to purchase the wagering occupational stamp.*
>
> "Commissioner Dunlap said that the old regulations, which have been in effect since November 1, 1951, caused difficulties in the enforcement of the stamp tax. *When gamblers and their agents were arrested by local authorities their defense usually was that they had just commenced business. In the absence of proof to the contrary, no Federal prosecution could be undertaken if the arrested person paid the special wagering tax before the end of the month in which he was arrested.* The new regulations, which become effective on Monday, provide that anyone in the business of taking taxable wagers for his own account or for the account of another person will be liable to prosecution if he does not have a wagering stamp at the time he accepts a bet.
>
> "A new occupational stamp must be purchased on or before July 1 of each year that the wagering business continues.
>
> "The new rule is expected to assist the Bureau of Internal Revenue in its task of collecting the 10 per cent excise tax on wagers placed with bookmakers, policy operators, and persons conducting lotteries." (Emphasis supplied)

Contrary to the assertion of the United States in its brief (footnote 2, page 9) that Section 3271, supra, has been administratively clarified by the Bureau of Internal Reve-

nue by this amendment, namely, Section 325.50, it is obvious from the foregoing press release that this amendment was not in fact a clarification of Section 3271, supra. Prior to August 29, 1952 and at the time this petitioner was charged, the regulation had provided for many months that the $50 tax must be paid on the last day of the month during which the business had been commenced. (Petitioner's main brief, page 39, Sec. 325.50) This was a proper construction of Section 3271 and of the provisions of the Wagering Tax Act, but since the payment of the $50 tax and registration was not required *until after* the commission of a Federal crime, such a requirement contravened the Fifth Amendment and imposes a penalty in the guise of a tax. The amended regulation has no foundation either in Section 3271, supra, or the provisions of the Wagering Tax Act for its validity. It is an endeavor on the part of the Bureau of Internal Revenue to legislate rather than interpret. Having no foundation in the organic act it is meaningless. The truth of the matter as is evidenced from the press release referred to hereinbefore is that the Bureau of Internal Revenue was interested in doing one of two things, namely, either endeavoring to aid local authorities to more effectively apprehend would be violators of state gambling statutes or lighten what it envisioned its burden at that time in apprehending gamblers who, when caught, could come in on the last day of that month and pay their taxes and the United States thereby possibly lose taxes for preceding months. Neither reason renders the amended regulation valid.

The United States at page 8 of its brief states:

> ". . . What he is in effect arguing is that Congress cannot tax an illegal business because payment of the tax would reveal the illegality. This Court has consistently rejected such an argument. *Sonzinsky* v. *United States*, 300 U.S. 506; *United States* v. *Sanchez*, 340 U.S. 42; *United States* v. *Constantine*, 206 U.S. 287, 293."

It is asserted that none of the cases cited support the statement of the United States. As is pointed out in the petitioner's main brief (pages 17-20), this Court has never held valid a federal tax which is imposed on an activity which is wholly illegal under federal law to the fullest extent to which the Congress of the United States could legislate. The activities taxed in *Sonzinsky* and *Sanchez* cases were not illegal under any Federal law provided that the persons complied with the provisions of the laws. To the contrary in the instant case. Further, in the *Constantine* case, supra, this Court held that a tax which is imposed on an activity which is wholly illegal *only under state law* was not valid.

The United States at page 6 would have this Court believe that the petitioner's main brief was the first time that he advanced the argument that certain provisions of the Wagering Tax Act contravene the Fourth Amendment. This is not the fact. This argument was advanced orally in the court of first instance as was stated in petitioner's main brief at page 6 and as is evidenced from the opinion of the court of first instance (R-27). The argument advanced by the United States that the provisions of Chapter 27A do not contravene the Fourth Amendment is fully rebutted by the petitioner's main brief (pages 20-22).

WHEREFORE, this petitioner again prays this Court that a Writ of Certiorari be granted because of the serious constitutional questions presented and the importance of these questions in the administration of Federal law generally.

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BRIEF ON MERITS
No. 203

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

---

FRANK LEWIS, *Petitioner*

v.

UNITED STATES OF AMERICA

---

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR THE PETITIONER

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## BRIEF FOR THE PETITIONER

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### OPINION BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 34) is reported at 214 F. 2d 853.

### JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 10, 1954 (R. 35). The Petition was filed July 9, 1954 and was granted October 14, 1954. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

## QUESTIONS PRESENTED

(1) Does Chapter 27A of the Internal Revenue Code 26 U. S. C., Section 3285 et seq. (Wagering Tax Act) as applied in the District of Columbia to this petitioner, contravene the Fifth Amendment to the United States Constitution?

(2) Is Chapter 27A of the Internal Revenue Code, 26 U. S. C., Section 3285 et seq. (Wagering Tax Act) as applied in the District of Columbia to this petitioner a legitimate exercise of the taxing power inasmuch as its provisions impose penalties in the guise of taxes?

(3) Do the provisions of Chapter 27A of the Internal Revenue Code, 26 U. S. C., Section 3285 et seq. (Wagering Tax Act) as applied in the District of Columbia to this petitioner contravene the provisions of the Fourth Amendment to the United States Constitution?

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The pertinent text of the foregoing are set out in the Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

## STATEMENT

By information filed by the United States in the Municipal Court for the District of Columbia on October 7, 1952, (R. 1), the defendant in this case was charged as follows:

> "Frank Lewis on December 13, 1951, and on diverse other days thereafter during the month of December, 1951, in the District of Columbia *engaged in the business of accepting wagers, by reason of such activity he was required by law to pay the occupational tax (wagering) of Fifty Dollars ($50.00) as imposed by Section 3290 of Internal Revenue Code,* he failed to

pay said tax, all in violation of Section 3294(a) Internal Revenue Code: Title 26, U. S. Code, Section 3294(a) and Section 2707(b) Internal Revenue Code as made applicable by Section 3294(c) Internal Revenue Code." (Italics supplied)

On October 28, 1952, a Motion to Dismiss this Information was filed. (R. 4)

The Municipal Court for the District of Columbia entered an Order on July 24, 1953, sustaining the petitioner's Motion to Dismiss (R. 26) and filed at that time a written Opinion (R. 4-26). The United States filed a Notice of Appeal on August 3, 1953 (R. 27). An Agreed Statement of Proceedings was filed on August 24, 1953 (R. 28). The Municipal Court of Appeals for the District of Columbia Circuit entered an Order on November 6, 1953, reversing the Municipal Court for the District of Columbia and remanding the case (R. 33). At the same time, the Municipal Court of Appeals for the District of Columbia filed a written Opinion (R. 29-33). On November 16, 1953, the petitioner by his counsel filed a Petition for an Allowance of Appeal to the United States Court of Appeals for the District of Columbia Circuit. The transcript of the Record from the Municipal Court of Appeals for the District of Columbia was filed with the United States Court of Appeals for the District of Columbia Circuit on November 20, 1953. The Petition for an Allowance of Appeal was heard on December 23, 1953, and this appeal was allowed on December 24, 1953. The United States Court of Appeals for the District of Columbia Circuit on June 10, 1954, affirmed the judgment of the Municipal Court of Appeals for the District of Columbia (R. 35). A Motion to Stay the Issuance of the Mandate for thirty days, to wit, until July 10, 1954, to enable this petitioner to make application to this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit was filed with that Court on June 16 and on June 23, 1954, and that Court

ordered the Mandate to be stayed to and including July 10, 1954. The Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit was filed in this Court on July 9, 1954, and the Writ was granted on October 14, 1954.

## SUMMARY OF ARGUMENT

The 10% tax imposed on wagers by Section 3285, Title 26, U.S.C. (Pet. for Cert., pages 27-28) is *retrospective* and is levied only on wagers which have been accepted. This has been admitted by the United States. See fn. 1, p. 6 infra. *All of the wagering activities subject to the 10% tax are wholly prohibited by Federal law in the District of Columbia.* See fn. 2, p. 6 infra. Payment of the 10% tax would thus compel this petitioner to incriminate himself in contravention of the Fifth Amendment to the United States Constitution. Therefore, this petitioner was not liable and could not become liable for this 10% tax and the 10% tax is not a true tax but is a penalty in the guise of a tax.

Liability for the 10% tax imposed by Section 3285 is the *sine qua non* for the $50 tax imposed by Section 3290, Title 26, U.S.C. (Pet. for Cert., p. 29). Therefore, this petitioner could not be required to pay the $50 tax imposed by Section 3290 for which failure to pay he has been charged criminally.

*This analysis applies even if the $50 tax section, Section 3290, is construed to require the payment of the $50 tax prior to the acceptance of a wager.* Under such a construction only those who would subsequently be liable for the 10% tax would be required to pay the $50 and register prior to accepting wagers. Since in the District of Columbia this petitioner is not and could not become liable for the 10% tax as it is unconstitutional as applied to him, he cannot be obliged to pay the $50 tax.

Section 3290 imposing the $50 tax is of itself unconstitutional in that it contravenes the Fifth Amendment and imposes a penalty in the guise of a tax. Since there can be no

liability for the 10% tax until the acceptance of a wager by one *engaged in the business of accepting wagers*, the $50 tax is not owing and due until *after* the acceptance of some wagers, or at the least, one wager. Therefore, payment of the $50 and registration contemporaneous therewith would compel the petitioner to incriminate himself in the District of Columbia in violation of the Fifth Amendment. And, since the United States is required to prove that the petitioner was engaged in the business of accepting wagers and had in fact violated Federal law in the District of Columbia by accepting wagers in order to prove liability for the $50 tax, the $50 tax itself imposes a penalty in the guise of a tax.

The provisions of the Wagering Tax Act also contravene the provisions of the Fourth Amendment to the Constitution in that the requirements for posting provided for in Section 3275, Title 26, U. S. C. and Section 3293, Title 26, U. S. C. would put the United States Attorney and the Metropolitan Police in the District of Columbia on notice that the compliant was engaged in activities in violation of Federal law in the District of Columbia and would lay a predicate for the issuance of a search warrant. These provisions constitute a device to obtain information under the guise of the taxing authority so that thereafter the United States could assert probable cause for the issuance of a search warrant and subsequently contend that any search or seizure pursuant thereto was valid.

The case of *United States* v. *Kahriger*, 345 U. S. 22, rehearing denied 345 U. S. 931, which arose in the State of Pennsylvania is neither controlling nor persuasive in this case because wagering activities subject to the provisions of the Wagering Tax Act are not illegal under Federal law in the State of Pennsylvania. All such activities are illegal under Federal law in the District of Columbia.

## ARGUMENT

### I.

### THE WAGERING TAX ACT IS UNCONSTITUTIONAL BECAUSE IT COMPELS SELF-INCRIMINATION IN CONTRAVENTION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND IMPOSES PENALTIES IN THE GUISE OF TAXES.

Analysis of the 10% tax on wagers imposed by Section 3285, Title 26, U.S.C. is essential to answer the questions posed by this case. This flows from the fact that in order to be subject to the $50 tax imposed by Section 3290, Titie 26, U.S.C. an individual must be obligated to pay the 10% tax. *This (the 10%) tax is retrospective,* that is, it is levied on wagers which have been actually accepted. This has been admitted by the United States.[1] The amount of the tax which must be paid month'y is determined by the amount of wagers which have been accepted in the particular month. Obviously, if acceptance of a wager is a Federal crime, then payment of the 10% tax requires the taxpayer to admit this. All of the wagering activities subject to this 10% tax are wholly prohibited by Federal law in the District of Columbia.[2] Therefore, this petitioner cannot be liable for the

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[1] Brief for the United States in Opposition to the Petition for a Writ of Certiorari, page 8 ". . . the 10% is retrospective and is levied on the gains of past activities . . ."

[2] Arnstein v. United States, 54 App. D. C. 199, 296 F. 946, cert. denied 264 U. S. 595; Storey v. Rives, 68 App. D. C. 325, 97 F. 2d 182, cert. denied, 305 U. S. 395; Act of June 25, 1948, c. 645, 62 Stat. 701, Title 18, U. S. C., Sec. 371 (Federal Conspiracy Statute) (Pet. for Cert., p. 34); Act of March 3, 1901, 31 Stat. 1330, ch. 854, § 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, § 1, Title 22, D. C. Code, Sec. 1501. (prohibits lotteries) (Pet. for Cert., p. 32), Act of April 5, 1938, 52 Stat. 198, ch. 72, § 2, Title 22, D. C. Code, Sec. 1502 (prohibits lotteries) (Pet. for Cert., p. 32); Act of March 3, 1901, 31 Stat. 1330, ch. 854, § 864, Title 22, D. C. Code, Sec. 1503 (prohibits lotteries) (Pet. for Cert., p. 33), Act of March 3, 1901, 31 Stat. 1331, ch. 854, § 869; May 16, 1908, 35 Stat. 164, ch. 172, § 3, Title 22, D. C. Code, Sec. 1508 (prohibits betting, gambling and making book on races or contests of any kind) (Pet. for Cert., p. 33).

10% tax on wagers because, to exact such a tax violates the Fifth Amendment to the United States Constitution and, also, the tax imposes a penalty in the guise of a tax. It follows then, that this petitioner was not obligated to pay the $50 tax which rests upon the 10% tax.

To come to this conclusion it is essential that Sections 3285, and 3290, be carefully reviewed. Section 3285, which is the revenue raising portion of this Act, reads in part as follows:

> "CHAPTER 27A—WAGERING TAXES.
>
> "Subchapter A—Tax on Wagers.
>
> "(a) Wagers. There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof." (Pet. for Cert. —page 27)
>
> "(b) Definitions. For the purposes of this chapter—
>
> "(1) The term 'wager' means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit."

Contrary to popular belief, all persons engaged in wagering activities are not liable for this 10% tax. Section 3285(b)(2) exempts certain types of wagering activities from this tax. That section reads as follows:

> "(2) The term 'lottery' includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived

> from such drawing inures to the benefit of any private shareholder or individual."

Thus, the 10% tax does not apply to wagers made in bingo games, poker games, roulette games, dice games, blackjack and the like.

In addition, Section 3285(e) exempts certain other types of wagers from the 10% tax. That section reads as follows:

> "(e) Exclusions from tax. No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by Section 3267."

It is clear from the foregoing that certain wagering activities are exempted from the 10% tax by statutory exemption and that persons engaged in those exempted types of wagering activities are not liable for the 10% tax. Such persons are exempted from the payment of the $50 tax imposed by Section 3290, as the $50 tax need be paid only by those liable for the 10% tax. This is clear from a reading of Section 3290, which reads as follows:

> "A special tax of $50 per year shall be paid by each person *who is liable for tax under subchapter A* or who is engaged in receiving wagers for or on behalf of any person so liable." (Italics supplied)

Section 3285(d) defines the persons who are liable for the 10% tax and reads as follows:

> "(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who

> conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

To ascertain who is liable for the 10% tax requires first a determination of what is meant by the words "engaged in the business." This is a phrase of art commonly defined as requiring acts of business to be conducted, prosecuted and continued. A single or occasional disconnected act does not constitute engaging in business.[3] In fact, subsequent to the opinion of this Court in *United States* v. *Kahriger,* 345 U. S. 22, rehearing denied 345 U. S. 931, District Judge Gibson in the case of *United States* v. *Forys,* 113 F. Supp. 580, 582 (D. C. R. I. 1953), in construing this very Act, stated:

> ". . . the acceptance of a single wager does not make the acceptor subject to this tax or subject to a penalty for not paying the tax. . . ."

The Court went on to state that with respect to the allegation that the defendant had "engaged in the business of accepting wagers":

> ". . . it requires the Government to prove that the defendant was a person 'engaged in the business of accepting * * * wagers' under the provisions of Sec. 3285."

Therefore, several wagers must be accepted before a person can be said to be *"engaged in the business"* of accepting wagers. (T. R. Reg. 132, Section 325.21 (Peti-

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[3] Hazen et al. v. National Rifle Assn. of America, Inc., 101 F. 2d 432, 439 (U. S. Ct. of App., D. C. 1938).

Hutchings v. Burnet, 58 F. 2d 514, 515 (U. S. Ct. of App., D. C. 1932).

Black's Law Dictionary, 3d Edition, 1944, pp. 260, 605.

Lewellyn v. Pittsburg, B. & L. E. R. Co., 222 Fed. Rep. 177, 185-186, cited with approval in G. C. M. 17014 (C. B. XV-2, 317 (1936)).

tion for Cert., p. 35)). However, no matter how narrowly Section 3285(d) is construed, at least one wager must be accepted before a person can be liable for the 10% tax. (Tr. Reg. 132, Sec. 325.24 (Pet. for Cert., p. 35)).

The Bureau of Internal Revenue by Treasury Reg. 132, Section 325.25 (Pet. for Cert., p. 36) states when the 10% tax attaches. That section reads as follows:

> "Sec. 325.25. When tax attaches.
>
> "(a) The tax attaches when (1) a person engaged in the business of accepting wagers with respect to a sports event or a contest, or (2) a person who operates a wagering pool or lottery for profit, *accepts a wager or contribution from a bettor.* In the case of a wager or credit, the tax attaches whether or not the amount of the wager is actually collected from the bettor." (Italics supplied)

The Bureau of Internal Revenue has also by Treasury Reg. 132, Section 325.42, Subsection (b), (Pet. for Cert., p. 39) defined the words "commencing business" appearing in Section 3271, Title 26, U. S. C. (Pet. for Cert., p. 43) as "*the initial acceptance of a wager by a person liable for the 10% excise tax . . .*" (Italics supplied).

Sec. 3285(d) provides further that each person shall pay the tax on all wagers *placed with him or placed in a pool or lottery.* Obviously, the tax cannot be compelled to be paid on wagers which have not been placed. The 10% tax has to have at least one wager on which to attach. It cannot fall on a vacuum.

It has been shown that the acceptance of even one wager in the District of Columbia is wholly prohibited by Federal law. From this fact it must be concluded that the 10% tax imposed by Subchapter A is unconstitutional as applied to this petitioner in the District of Columbia and there are two uncontrovertible arguments in support of this assertion.

First, the 10% tax must be paid by the taxpayer on the last day of each month succeeding the month in which the wagers were accepted,[4] at which time the taxpayer must file a form denominated "Tax on Wagering" (Pet. for Cert., pp. 45-46). A reading of this return discloses that all of the questions are incriminatory on their face and are offensive. Therefore, the rule enunciated by this Court in *United States* v. *Sullivan*, 274 U. S. 259 does not apply. This requirement which compels a person to file this return on the last day of each month succeeding the month in which the wagers were accepted constitutes compulsory filing of monthly reports admitting Federal crimes which had been committed by the taxpayer, to wit, the acceptance of wagers in the District of Columbia in violation of Federal law proscribing such activities. Therefore, Section 3285 which the United States admits deals with and can only deal with past acts,[5] namely, the payment of a tax on wagers which have been accepted and the filing of a return admitting that fact, contravenes the Fifth Amendment and is unconstitutional.

Secondly, having shown that at least one wager must be accepted before there is any liability for the 10% tax, it is obvious that to successfully collect and retain the taxes alleged to be due, the United States would have to claim and ultimately prove that this petitioner had accepted wagers or at least one wager, a Federal offense. There are no provisions of District of Columbia law whereby a person is licensed to engage in wagering activities. *All such activities are prohibited by Federal law.* This Court has repeatedly held that where evidence of the commission of a Federal offense is essential to the imposition of a tax it lacks the ordinary characteristics of a tax and is a penalty and

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[4] T. R. 132, Sec. 325.30. (Pet. for Cert., p. 36)

[5] Brief for United States in Opposition to Petition for Certiorari, page 8.

not a legitimate exercise of the taxing power.[6] In the most recent case decided on this point, this Court in *United States* v. *Sanchez*, 340 U. S. 42, 71 S. Ct. 108, 110, in upholding the validity of the Marihuana Tax Act found that tax to be valid because it stated:

> "Second. *The tax levied by Sec. 2590(a)(2) is not conditioned upon the commission of a crime. The tax is on the transfer of marihuana* to a person who has not paid the special tax and registered. *Such a transfer is not made an unlawful act under the statute.* Liability for the payment of the tax rests primarily with the transferee; but if he fails to pay, then the transferor, as here, becomes liable. It is thus the failure of the transferee to pay the tax that gives rise to the liability of the transferor. *Since his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction . . .*" (Italics supplied)

This rationale cannot be applicable to the case at hand.

It is submitted that the foregoing arguments clearly show the unconstitutionality of the 10% tax as applied to this petitioner in the District of Columbia.

This petitioner, as was Kahriger, has been charged with failing to comply with Section 3290, the $50 tax section. However, the situation in this case differs radically from that confronting the Court when it arrived at this point in *Kahriger*. When this Court turned to a consideration of the $50 tax section in *Kahriger*, supra, it had theretofore concluded that the 10% tax which is the substance of the Wagering Tax Act was constitutional as applied in the states. Having so found, this Court found nothing offensive in the $50 tax or the registration statement which must accompany its payment stating that all the latter was designed to do was to aid in the collection of the 10% tax.

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[6] Lipke v. Lederer, 259 U. S. 557, 561-562, Regal Drug Corp. v. Wardell, 260 U. S. 386, United States v. La Franca, 282 U. S. 572. *U. S.* v. *One Ford Coupe*, 272 U. S. 321, 328.

(*Kahriger*, pages 31-32). But it has been shown that as to this petitioner the 10% tax is unconstitutional. Liability for the payment of the $50 tax required by Section 3290 is predicated on a liability for the 10% tax and this petitioner was therefore under no obligation to pay the $50 tax and register contemporaneously with such payment. That this is true is apparent from a rereading of the $50 tax section which reads as follows:

> "A special tax of $50 per year shall be paid by each person *who is liable for tax under subchapter A* or who is engaged in receiving wagers for or on behalf of any person so liable."

Obviously liability for the 10% tax is the *sine qua non* for liability for the $50 tax. T. R. 132, Sec. 325.41 (Pet. for Cert., p. 38). Where there is no liability for the 10% tax, either by virtue of the exemptions in the 10% tax section or because the 10% tax is unconstitutional as applied in a Federal jurisdiction, there is no liability for the $50 tax. Therefore, even if this Court were to adopt the distorted construction of the $50 tax section placed on that section by the Municipal Court of Appeals for the District of Columbia (R. 29-33), to wit, that the $50 tax must be paid before the acceptance of a wager, there still would be no violation of that section by this petitioner. This petitioner would not subsequently be liable for the 10% tax because it is unconstitutional as applied to him. Therefore, even if the $50 tax section were to be rewritten to provide that a special tax of $50 shall be paid by each person who is going to be liable for the 10% tax, this petitioner still would not be under any constitutional obligation to comply with that provision because he is not, will not, and cannot become liable for the 10% tax.

There is still an additional reason why this petitioner was not required to pay the $50 tax even if Section 3290 were to be interpreted to mean that the tax must be paid

prior to engaging in the business of accepting wagers. As the Municipal Court for the District of Columbia pointed out (R. 11):

> "Even if, for the sake of argument, it were to be admitted that this contention in general is sound, I feel it would fall in the District of Columbia by the virtue of the criminal sanctions that can be imposed under Section 371 of Title 18, U. S. C. For even assuming that the payment of the tax and registering would not compel a confession of past illegal substantive acts, nevertheless if two or more persons conspired to violate any of the anti-gambling provisions of the District of Columbia and in pursuance of that conspiracy one of the conspirators applied for a tax stamp, such an act would be an overt act in furtherance of the conspiracy and sufficient to sustain a conviction. . . ."

Since, therefore, a distorted construction of the $50 tax section does not render that section applicable to this petitioner, this Court should not distort its plain and obvious meaning as did the lower appellate courts. The lower appellate courts would have this Court read the $50 tax section as follows:

> "A special tax of $50 per year shall be paid by each person * * *"

But the statute contains the words sought to be stricken. Words could not be found which are clearer than those used in this section, namely *that the tax of $50 shall be paid only by those who are liable for the 10% tax* which means those engaged in the business of accepting wagers and who have accepted at least one wager. The Congress itself in its committee report affirms this statement for it said:

> "The committee conceives of the occupational tax as an integral part of any plan for the taxation of wagers and as essential to the collection and enforcement of such a tax. Enforcement of a tax on wagers frequently will necessitate the tracing of transactions

through complex business relationships, thus requiring the identification of the various steps involved. For this reason, the bill *provides that a person who pays the occupational tax must, as part of his registration, identify those persons who are engaged in receiving wagers for or on his behalf, and, in addition, identify the persons on whose behalf he is engaged in receiving wagers.*" (H. Rep. 586, 82d Cong., 1st Sess., p. 60; S. Rep. 781, 82d Cong., 1st Sess., p. 118) (Italics supplied)

Since the $50 tax is not owing and due until a person engaged in the business of accepting wagers has accepted at least one wager, the requirement to pay the $50 and register contemporaneously therewith also compels self-incrimination in contravention of the Fifth Amendment because by paying the $50 tax and registering he would admit that he was engaged in the business of accepting wagers and had accepted at least one wager. Further, the $50 required to be paid constitutes the imposition of a penalty and is not a true tax. To collect the tax it is necessary to first prove the commission of a Federal criminal offense. (T. R. 132, Secs. 325.50, 325.51, 325.52, 325.53, 325.54, Pet. for Cert., pp. 39-41). Therefore, the $50 tax section is itself unconstitutional.

It is submitted that the lower appellate courts misinterpreted the language of this Court in the *Kahriger* case at pages 32-33 wherein it stated that Kahriger was not compelled by the registration provisions of the Wagering Tax Act to confess to acts already committed but was merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions. All that this Court could have meant by that statement was that compliance with the registration provisions would not compel Kahriger to admit any violation of any existing Federal law in Pennsylvania nor compel him to admit any violation of state law which he had committed prior to the effective date of the Wagering Tax Act.[7] The

[7] Treasury Reg. 132, Section 325.40 (Pet. for Cert., p. 38).

foregoing statement is supported by a reference to the Briefs for the United States filed in the *Kahriger* case, supra. Therefore, the Federal Government could require Kahriger to pay the $50 tax and register. *But not this petitioner.*

A brief comment is deemed proper with respect to the closing sentence of the Opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 34) wherein it stated:

> "Of course, Congress may tax what it also forbids." (R. 34)

citing *United States* v. *Statoff*, 260 U. S. 477, as authority. It is submitted that the United States Court of Appeals for the District of Columbia Circuit completely misconstrued that language which was taken out of context. In the *Statoff* case, at page 480, the Court relied on the case of *United States* v. *Yuginovich*, 256 U. S. 450, 464. But the United States Court of Appeals for the District of Columbia Circuit overlooked the fact that the tax that was being referred to was the basic production tax on liquor whether or not legally or illegally manufactured. In the *Yuginovich* case this Court made a point of the fact that liquor could be manufactured for non-beverage purposes (p. 480) and all that the National Prohibition Act[8] prohibited was manufacture, etc., of intoxicating liquor for beverage purposes. This Court never upheld the so-called double tax applicable only to illegal manufacture. *Lipke* v. *Lederer*, 259 U. S. 557, *United States* v. *One Ford Coupe*, 272 U. S. 321, 328, and *United States* v. *La Franca*, 282 U. S. 568, 572.

All that this Court held in the Prohibition Act cases, decided by it and referred to hereinbefore, was that the basic production tax was a true tax in that it applied to the manufacture of liquor which was licensed as well as so-called bootleg whiskey. The Court also held that where an

[8] Pet. for Cert., p. 44.

additional tax was imposed solely on illegal manufacture, that is, bootleg whiskey, the additional tax was not a true tax but was a penalty in the guise of a tax and was not a legitimate exercise of the taxing power. An identical situation exists in the present case inasmuch as the Federal Government has to the fullest extent of its authority wholly prohibited the wagering activity sought to be taxed.

## II.

## THE PROVISIONS OF THE WAGERING TAX ACT CONTRAVENE THE PROVISIONS OF THE FOURTH AMENDMENT TO THE CONSTITUTION.

The provisions of the Wagering Tax Act contravene the Fourth Amendment.[9] Specifically, it is submitted that Sections 3275 (Pet. for Cert., p. 47) and 3293 (Pet. for Cert., p. 30) of Title 26, U. S. C. contravene the provisions of the Fourth Amendment. It is well settled that probable cause for issuing a search warrant is less than proof of guilt.[10] As was stated in the case of *Dumbra* v. *United States,* 268 U. S. 435, at page 441:

> "In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant."

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[9] Fourth Amendment to United States Constitution (Pet. for Cert., p. 33).

[10] Dumbra v. United States, 268 U. S. 435; Steele v. United States, No. 1, 267 U. S. 498; cf. Brinegar v. United States, 338 U. S. 160; Carroll v. United States, 267 U. S. 132.

Compliance with the provisions of Chapter 27A, supra, would result in a posting by the Collector of Internal Revenue pursuant to the provisions of Section 3275, Title 26, U. S. C. (Pet. for Cert., p. 47). This section would require the Collector to post in a conspicuous place in his office, for public inspection, the name of this defendant and the time, place and business for which the special tax was paid. This would immediately put the United States Attorney for the District of Columbia on notice that this defendant was engaged in activities in violation of Federal law in this District, and he could immediately obtain the returns filed and use them in a prosecution against this defendant or at least obtain leads from them whereby he could prosecute him.[11] Further, Section 3293, supra, would require this defendant to post the special tax stamp in his place of business under penalty of Federal law if he fails so to do.[12] The contravention of the Fourth Amendment is made quite apparent by this section for the very business for which the special tax stamp is issued and required to be posted is unlawful in the District of Columbia.[13] Since compliance with either or both of the foregoing sections would lay a predicate for the issuance of a search warrant, this compulsion constitutes a device to obtain information under the guise of statutory authority so that thereafter the United States could assert "probable cause" for the issuance of a search warrant and subsequently contend that any search or seizure pursuant thereto was valid.

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[11] Treas. Dec. 4929, Secs. 463C.32, 463C.33, 463C.34, Pgs. 41-42; Treasury Dec. 5138, Sec. 458.611 (Pet. for Cert., Pg. 41 et seq.).

[12] Tit. 26, U. S. C., Sec. 3293 (Pet. for Cert., Pg. 30). Treasury Regs. 132, Section 325.53 (Pet. for Cert., Pg. 41)

[13] United States v. Yuginovich, supra, page 464.

## III.

## UNITED STATES v. KAHRIGER IS NEITHER CONTROLLING NOR PERSUASIVE.

The United States relies wholly on the opinion of this Court in *United States* v. *Kahriger,* supra. However, the United States fails to realize that in the *Kahriger* case this Court merely passed on the validity of the Wagering Tax Act as applied to activities *in the states.* This Court stated in the *Kahriger* case, supra, at page 26:

> "... The wagering tax with which we are here concerned applies to all persons engaged in the business of receiving wagers regardless of whether such activity violates state law...."

The question before this Court as stated by the United States in its Brief in *Kahriger,* at page 2 was:

> "Whether the occupational tax provisions of the Revenue Act of 1951 (26 U. S. C., Supp. V, 3290) which levy a tax on persons engaged in the business of accepting wagers, and require such persons to register with the Collector of Internal Revenue, are unconstitutional because incidental regulatory features of the registration section (26 U. S. C., Supp. V, 3291) infringe the police power reserved to the States."

The question of the constitutionality of the Wagering Tax Act as applied in a federal jurisdiction which wholly prohibits wagering activities was never raised. In fact the United States in its Reply Brief filed in *Kahriger* stated at page 2:

> "... *the occupation taxed is unlawful only under state laws* ..." (Italics supplied)

and at page 3

> "... *Wagering is doubtless unlawful in many states (perhaps in all but Nevada) but it is not forbidden by any Federal law. Thus the registration statement in* which the taxpaper is required to set

> forth his name, address and places of business, and the names and addresses of his agents or principals does *not call for a disclosure of information which will reveal a violation of federal law.*" (Italics supplied)

The contrary is the fact in the District of Columbia.[14]

It will be recollected that Kahriger was a defendant who had engaged in the business of accepting wagers in the State of Pennsylvania and failed to pay the $50 tax required by Section 3290, supra. In that case this Court, properly, and before passing on the validity of the $50 tax section, reviewed its prior decisions with respect to other taxing statutes and cited those decisions[15] as authority for its conclusion that the 10% tax imposed by Subchapter A of the Wagering Tax Act (Section 3285, et seq. Title 26, U. S. C., Pet. for Cert., p. 27) was constitutional.

There is a basic and controlling distinction between the instant case and the cases relied on by this Court in *Kahriger*. *In each and every case so cited, the statutes construed therein by this Court imposed taxes on activities which were not illegal under any Federal law.* Even today, persons engaged in such activities are not subject to Federal prosecution if the required tax is paid and compliance be had with the regulations effectuating such statutes. But this is not true as to the wagering tax. Payment does not confer a license to accept wagers. (Cf. *Irvine* v. *People*, 347 U. S. 128, 130.) The wagering activities embraced by the provisions of the Wagering Tax Act are prohibited by Federal laws to the fullest extent that the United

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[14] See footnote 2, supra.

[15] License Tax Cases, 5 Wall. 462 (Tax on lottery tickets—no federal law prohibiting lotteries at that time); Veazie Bank v. Fenno, 8 Wall. 533 (Tax on paper money issued by state banks); McCray v. United States, 195 U. S. 27, 59, 24 S. Ct. 769, 777 (tax on colored oleomargarine); United States v. Doremus, 249 U. S. 86, 39 S. Ct. 214 and Nigro v. United States, 276 U. S. 332, 48 S. Ct. 388 (tax on narcotics); Sonzinsky v. United States, 300 U. S. 506, 57 S. Ct. 554 (tax on firearms); United States v. Sanchez, 340 U. S. 42 (tax on marihuana).

States can proscribe such activities.[16] Payment of the tax confers no dispensation from liability for the Federal crime. Absent a constitutional amendment such as the 18th Amendment, the Federal Government has no authority either to permit or prohibit wagering activities in the states. The Constitution, however, confers on Congress sovereign power over the District of Columbia[17] and this power has been exercised to prohibit all wagering activities.

To state the proposition in another manner; payment of the taxes and registration and filing of returns pursuant to the statutes reviewed in the cases relied on by this Court in *Kahriger* give to the taxpayers permission or license to engage in those activities insofar as the Federal Government is concerned. In obeying those laws no revelation of a Federal crime is required. As was pointed out in the License Tax Cases, supra, quoted with approval by this Court in *Kahriger* at page 27,

> ". . . The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax and of implying nothing except that the licensee shall be *subject to no penalty under national law if he pays it.*" (Italics supplied)

Compliance with the provisions of the Wagering Tax Act would not exempt this petitioner from any penalties provided by the Federal laws prohibiting wagering in the District of Columbia. Section 3297, Title 26, U. S. C. (Wagering Tax Act, Pet. for Cert., p. 31) specifically negates any such conclusion because that section states in part:

> "Sec. 3297. Applicability of Federal and State Laws.
>
> "The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States . . ."

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[16] See Footnote 1.

[17] Article I, Section 8, Clause 17 (Pet. for Cert., Pg. 44).

It is obvious that compliance with the provisions of the Wagering Tax Act would assure prosecution for the violation of other Federal laws by virtue of the notice which would be given to the United States Attorney by the posting provisions, Sections 3275 (Pet. for Cert., p. 47) and 3293 (Pet. for Cert., p. 30) and Treasury Decisions which make these excise returns available to the prosecuting authorities.[18] This petitioner was not required to comply with the provisions of the Wagering Tax Act by filing the returns required for if he had done so he would have waived his privilege against self-incrimination. In order to avail one's self of the privilege against self-incrimination a person must invoke the privilege at the first apprehension of danger, that is at the first moment when information is called for which if given by him would incriminate or tend to incriminate him of a violation of Federal law. In the case of *United States* v. *St. Pierre,*[19] the court said:

> "The time for a witness to protect himself is when the decision is first presented to him;" . . .

The time when the decision is first presented to him differs according to the circumstances. As the court stated in *United States* v. *Pechart*:[20]

> " . . . It is conceded in the record that the defendants were men engaged in gambling and other related so-called racketeering activities. Because of that fact,

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[18] T. D. 4929 Pg. 26 Int. Rev. Cumulative Bulletin:

Sec. 463C.32 (Pet. for Cert., p. 41).
Sec. 463C.33 (Pet. for Cert., p. 42).
Sec. 463C.34 (Pet. for Cert., p. 42).

T. D. 5138 Int. Rev. Cumulative Bulletin, 1942-17-11074, Pg. 99:
Sec. 458, 611 (Pet. for Cert., p. 43).

[19] United States v. St. Pierre, 132 F. 2d 837, writ dismissed, 63 S. Ct. 910, 319 U. S. 41.

[20] United States v. Pechart, 103 F. S. 417, 419 (D. C. N. D. Calif. 1951).

are they to be deprived of the right to exercise their constitutional privileges?

"Preliminarily to a decision on the fact, I think it may be pertinent and appropriate to state that if the constitutional privilege becomes unavailing to a person because of his occupation, it is but a short step to make it unavailing to a man because he is a Republican or a Democrat, or a Catholic or a Jew. The privilege is one that is exercisable by any person provided that the facts and circumstances warrant its exercise." • • •

"Furthermore, the case is not precedentially of any value to us *because the matter of the exercise of privilege may be different in given circumstances, at a different time, and in a different forum and where different issues are present.* Every case where the exercise of the privilege against self-incrimination is sought to be availed of must be determined with respect to the facts and circumstances of that particular case." (Italics supplied)

Where the questions call for answers incriminatory on their face there is no burden on the witness to show special circumstances why the answers called for would be incriminatory.[21] Where they are not incriminatory on their face, the person must show some tangible and substantial probability that his answers to such questions would tend to incriminate him. It is then for the court to finally determine whether incrimination is reasonably possible from any answer the witness may give, but, if such possibility exists the privilege bars compulsory disclosure of any fact that would tend to incriminate him.[22]

It is submitted that this petitioner properly exercised his privilege against self-incrimination. In the circumstances, the only thing he could do was to remain silent, refuse to pay the tax imposed by Section 3290 and withhold the information required by Section 3291 and Form 730

[21] United States v. Raley, 96 F. S. 495, 496 (D. C. D. C. 1951).

[22] Estes v. Potter, 183 F. 2d 865, 868, Cert. Denied 81 S. Ct. 356, 340 U. S. 920.

(Pet. for Cert., pp. 45-46) because the questions call for answers which on their face incriminate or tend to incriminate in the District of Columbia.

In *Blau* v. *United States*, 340 U. S. 159, at page 160, 71 S. Ct. 223, 224, this Court stated:

> "Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act. Prior decisions of this Court have clearly established that under such circumstances, *the Constitution gives witness the privilege of remaining silent.*" (Italics supplied)

All that is required in invoking the privilege against self-incrimination is that the answer might tend to incriminate or might furnish a link in the chain of evidence which might ultimately incriminate.[23] If a witness having the right to invoke the privilege under such circumstances fails to so do and furnishes the information called for, such person waives the privilege.[24]

## CONCLUSION

(1) Since the acceptance of wagers in the District of Columbia is wholly prohibited by Federal law, the 10% tax sought to be imposed on each wager accepted by persons engaged in the wagering business is unconstitutional.

(a) This 10% tax is retrospective and applies only to past activities and therefore contravenes the Fifth Amendment

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[23] United States v. Burr, 25 Fed. Cases, pages 38, 40, No. 14,692e. Hoffman v. United States, 71 S. Ct. 814, 818. Blau v. United States, 340 U. S. 159.

[24] Rogers v. United States, 71 S. Ct. 438. United States ex Rel. Vajtauer v. Commissioner, 47 S. Ct. 302, 273 U. S. 103. United States v. Murdock, 281 U. S. 141. United States v. Monia, 317 U. S. 424.

in that compliance with the pertinent provisions compel an admission of the commission of prior Federal crimes during the month in question.

(b) The 10% tax is a penalty in the guise of a tax and not a true tax in that proof of a commission of a Federal crime in the District of Columbia, to wit, the acceptance of a wager is a prerequisite to liability for the 10% tax. Therefore it is not a legitimate exercise of the taxing power.

(c) Since Section 3290, supra, the $50 tax section, only requires those persons liable for the 10% tax to pay the $50 tax and register, this petitioner did not violate the $50 tax section by failing to pay as he was not liable for the 10% tax.

(2) (a) The $50 tax section, Section 3290, supra, is of itself unconstitutional in that it contravenes the Fifth Amendment and also imposes penalties in the guise of a tax as it is grounded on a liability for the 10% tax. As has been shown, to be liable for the 10% tax, at least one wager must be accepted. Therefore, the $50 tax and registration contemporaneous therewith would compel the admission of the Commission of at least one past Federal crime, to wit, the acceptance of a wager in the District of Columbia.

(b) Even if the $50 tax section, Section 3290, supra, is construed by this Court to require payment of the $50 tax and registration contemporaneous therewith prior to the acceptance of a wager, that Section is still only applicable to persons who subsequently will be liable for the 10% tax. In the District of Columbia this petitioner will never be liable for the 10% tax. Therefore, he was not liable for the $50 tax.

(3) Sections 3275 and 3293 contravene the Fourth Amendment in that they are devices to furnish the prosecuting officials with information to assert as a

predicate for support of the requirement of "probable cause" required for the issuance of a valid search warrant.

(4) The decision of the United States Court of Appeals for the District of Columbia Circuit in this case if not reversed bestows in advance a judicial blessing on all amendments by the Congress of the United States to existing Federal criminal statutes providing for the imposition of excise taxes on illegal activities as well as requiring each violator of such statutes to file monthly returns confessing he has committed Federal crimes. The result would be the deletion of the Fifth Amendment from the Constitution of the United States.

WHEREFORE, this petitioner prays this Court that the Judgment of the United States Court of Appeals for the District of Columbia Circuit be reversed.

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No. 203



# In the Supreme Court of the United States

OCTOBER TERM, 1954

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FRANK LEWIS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 35-36) is not yet reported. The opinion of the Municipal Court of Appeals for the District of Columbia (R. 30-34) is reported at 100 A. 2d 40. The opinion of the Municipal Court for the District of Columbia appears at pp. 5-27 of the record.

### JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was

entered June 10, 1954. The petition for a writ of certiorari was filed July 9, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner can validly withhold payment of the $50 occupational tax on wagerers imposed by 26 U.S.C. 3290 on the ground that its payment in the District of Columbia would tend to incriminate him.

2. Whether the posting requirements of the Wagering Tax Act violate petitioner's right against unreasonable search and seizure secured to him by the Fourth Amendment.

STATUTE INVOLVED

Pertinent portions of the Act of October 20, 1951, 65 Stat. 529, 26 U. S. C. 3285-3298, provide:

Chapter 27A—Wagering Taxes

Subchapter A—Tax on Wagers

§ 3285. Tax.

(a) Wagers.

There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) Definitions.

For the purposes of this chapter—

(1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the busi

ness of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

* * *

(d) Persons liable for tax.

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

* * *

SUBCHAPTER B—OCCUPATIONAL TAX

§ 3290. Tax.

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.

§ 3291. Registration.

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity

which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

* * *

§ 3293. Posting.

Every person liable for special tax under this subchapter shall place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person, and exhibit it, upon request, to any officer or employee of the Bureau of Internal Revenue

§ 3294. Penalties.

(a) Failure to pay tax.

Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

(b) Failure to post or exhibit stamp.

Any person who, through negligence, fails to comply with section 3293, shall be liable to a penalty of $50, and the cost of prosecution. Any person who, through wilful neglect or refusal, fails to comply with section 3293, shall be liable to a penalty of $100, and the cost of prosecution.

* * *

SUBCHAPTER C—MISCELLANEOUS PROVISIONS

§ 3297. Applicability of federal and state laws.

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

STATEMENT

On October 7, 1952, an information was filed in the Municipal Court for the District of Columbia

charging petitioner under 26 U. S. C. 3294(a) with engaging in the business of accepting wagers without first paying the occupational tax of $50 required by 26 U. S. C. 3290 (R. 1-2). Petitioner's motion to dismiss (R. 4-5) was granted by the Municipal Court for the District of Columbia, which held that the Wagering Tax Act is violative of the self-incrimination provision of the Fifth Amendment and constitutes a penalty as applied in the District of Columbia. That court did not pass on an alternative contention (now urged by petitioner) that the statute violated petitioner's Fourth Amendment rights (see R. 27).

On appeal by the United States to the Municipal Court of Appeals for the District of Columbia, the order of dismissal was reversed on the ground that the issues involved had been settled by this court in *United States* v. *Kahriger*, 345 U. S. 22 (R. 30-34). On appeal by petitioner to the United States Court of Appeals for the District of Columbia Circuit, that court similarly found in a *per curiam* decision that the occupational tax is constitutional in its application to the District of Columbia, citing the *Kahriger* case, *supra* (R. 35-36).

## ARGUMENT

1. Petitioner attempts to distinguish his situation from that involved in *United States* v. *Kahriger*, 345 U. S. 22, on the ground that in that case, the registration and payment of the tax would at most incriminate a person under state law, while, so he contends, in the District of Columbia regis-

tration and payment of the tax would be incriminating under federal law.

The *Kahriger* decision did not, however, turn on whether the registration would or would not be incriminating under federal law. That decision reads in part, 345 U. S. at p. 32:

> If respondent wishes to take wagers subject to excise taxes under Section 3285, *supra*, he must pay an occupational tax and register. Under the registration provisions of the wagering tax, appellee is not compelled to confe to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfil certain conditions.

No one forced petitioner to engage in the wagering business. When he elected to remain in the business, he did so with full knowledge that the federal government had imposed a tax on this occupation. He could not elect to continue in the business and reject the tax burdens which Congress had placed upon it. "[T]here is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in future be criminal at the choice of the party reporting." 8 Wigmore, *Evidence* (3rd ed.) 1940, Sec. 2259*c*.

Petitioner's elaborate argument that the $50 occupational tax is incriminating as to past activities because it applies only to persons who have

already become liable for payment of the 10% tax imposed by 26 U. S. C. 3285 and therefore have already placed at least one wager is irrelevant. The fact still remains that petitioner was informed before he ever accepted any wager that if he wished to engage in business he would have to pay both the $50 occupational and 10% tax. What he is in effect arguing is that Congress cannot tax an illegal business because payment of the tax would reveal the illegality. This Court has consistently rejected such an argument. *Sonzinsky* v. *United States*, 300 U. S. 506; *United States* v. *Sanchez*, 340 U. S. 42; *United States* v. *Constantine*, 206 U. S. 287, 293.[1]

Moreover, petitioner's premise is unsound. It is apparent from an integrated reading of the statute that the $50 occupational tax is payable prospectively and before any wager is negotiated, while the 10% tax is retrospective, and is levied on the gains of past activities. Petitioner's error arises from the fact that 26 U. S. C. 3290, *supra*, imposes the occupational tax on "each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable." This, he contends, limits liability for the occupational tax to those who are also liable to a 10% tax on some previous wagering transaction. If, however, this section is read together with its penalty provision (26 U. S. C. 3294) it is obvious

[1] This is also the substance of petitioner's argument (Pet. 18-20) that in the District of Columbia the tax is a penalty rather than a tax, and the argument falls under the weight of the above-cited decisions.

that the occupational tax liability (although imposed against the same statutory *class* of persons) is fixed as of a time antecedent to the doing of the activities for which the 10% tax is assessed, and as a condition precedent to them.[2] Paying the occupational tax, therefore, does not *ipso facto* identify one who has already engaged in wagering in the District of Columbia, but evidences at most merely a future intent to do so. It has, if anything, less criminatory implication than the act of registering

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[2] *See* 26 U.S.C. 3271 (adopted by reference in 26 U.S.C. 3292) which provides in pertinent part:

"(a) Condition precedent to doing business.

"No person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor in the manner provided in this chapter.

"(b) Due date.

"All special taxes shall become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year, and in the latter case it shall be reckoned proportionately, from the 1st day of the month in which the liability to a special tax commenced, to and including the 30th day of June following."

This statutory provision has been administratively clarified by the Bureau of Internal Revenue in an amendment to its Regulation 132 which now provides in pertinent part as follows (26 C.F.R. (1954 Supp.))

"Sec. 325.50. *Registry, return and payment of tax.*

"(a) No person shall engage in the business of accepting wagers subject to the 10 percent excise tax imposed by section 3285 of the Internal Revenue Code (see section 325.24) until he has filed a return on Form 11-C and paid the special tax imposed by section 3290. Likewise, no person shall engage in receiving wagers for or on behalf of any person engaged in such business until he has filed a return on Form 11-C and paid the special tax imposed by section 3290 of the Internal Revenue Code. • • •"

tax data which was held constitutionally valid in *United States* v. *Kahriger, supra.*

2. Petitioner also contends (Pet. pp. 20-22) that certain provisions of the revenue laws (26 U. S. C. 3273, 3293) requiring taxpayers to post special stamps in their place of business showing payment of the tax, and a provision (26 U. S. C. 3275) requiring each collector to maintain a public list of such taxpayers, violate his right against unreasonable searches and seizures under the Fourth Amendment. It is argued that such information would put the local United States Attorney on notice of petitioner's possible criminal activities and would lay a foundation for the issuance of a search warrant. Since the posting and filing are clearly not an actual search, and since a search under a warrant based on probable cause would not be a violation of the Fourth Amendment, the entire argument is merely an attempt to clothe in other terms petitioner's basic and untenable position that a tax on an illegal business is unconstitutional.

As a practical matter, it is apparent that compliance with the registration requirements sustained as constitutional in *United States* v. *Kahriger, supra*, would furnish public officials with any information which might be obtained from the posting requirement. Furthermore, there is no constitutional objection to requirements validly implementing collection of the revenue, such as these. *United States* v. *Kahriger, supra* (345 U. S. at pp. 31-32). The provisions requiring that the special stamp be posted by the taxpayer are analogous to

legislative provisions which require the keeping of records " * * * in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established." *Shapiro* v. *United States*, 335 U.S. 1, 33. Such records are endowed with attributes of public records and do not possess the same protection of the Fourth Amendment as do private papers. *Shapiro* v. *United States, supra; Davis* v. *United States*, 328 U. S. 582, 589-590; *Wilson* v. *United States*, 221 U. S. 361, 380; *Boyd* v. *United States*, 116 U. S. 616, 623-624. Cf. Meltzer, *Required Records, the McCarran Act, and the Privilege against Self-Incrimination*, 18 U. of Chi. L.R. 687, 715-719.

## CONCLUSION

The decision below is clearly sustained by the recent opinion of this Court in *United States* v. *Kahriger, supra.* It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST, 1954.

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No. 208

# In the Supreme Court of the United States

OCTOBER TERM, 1954

FRANK LEWIS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES

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# In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 203

FRANK LEWIS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 34) is reported at 214 F. 2d 853. The opinion of the Municipal Court of Appeals for the District of Columbia (R. 29) is reported at 100 A. 2d 40. The opinion of the Municipal Court for the District of Columbia (R. 4–26) is not reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1954 (R. 35). The petition for a writ of certiorari was filed on July 9, 1954, and granted on October 14, 1954 (R. 36).

The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

Necessarily conceding the validity of the Wagering Tax Act as applied in the 48 States and upheld in *United States* v. *Kahriger*, 345 U. S. 22, petitioner argues that it is unconstitutional in the District of Columbia where gambling has been outlawed by Congress. As regards the application of the Act in the District of Columbia, the questions presented are:

1. Whether petitioner may withhold payment of the $50 occupational tax on persons accepting wagers on the ground that its payment would tend to incriminate him.

2. Whether the posting requirements of the Act violate petitioner's right against unreasonable search and seizure secured to him by the Fourth Amendment.

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Constitution of the United States, the Act of October 20, 1951, 65 Stat. 529, 26 U. S. C. 3285–3298,[1] and Treasury Regulations involved are printed in the Appendix, *infra*, pp. 29–53.

[1] The references in this brief to Title 26 are to the United States Code, 1952 edition, containing the Internal Revenue Code of 1939, as amended. In the Internal Revenue Code of 1954, the wagering tax provisions are found in Sections 4401–4404, 4411–4413, 4421–4423, 4903, 4907, 6091 (b), 6107, 6419, 6806 (c), 7262, and 7273 (b).

**STATEMENT**

On October 7, 1952, an information was filed in the Municipal Court for the District of Columbia charging petitioner (R. 1) under 26 U. S. C. 3294 (a) and 26 U. S. C. 2707 (a), as made applicable by 3294 (c), with engaging in the business of accepting wagers during December 1951 without having paid the occupational tax required by 26 U. S. C. 3290.[2] The Municipal Court granted peti-

[2] 26 U. S. C. 3290:

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U. S. C. 3294:

(a) Failure to pay tax.

Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

* * * * *

(c) Willful violations.

The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter.

26 U. S. C. 2707 (a):

Any person who willfully fails to pay, collect, or truthfully account for and pay over the tax imposed by section 2700 (a), or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. * * *

tioner's motion to dismiss the information (R. 26). In its written opinion (R. 4–26), it held the Wagering Tax Act unconstitutional as applied to petitioner in the District of Columbia on the grounds that, since laws enacted by Congress prohibit gambling in the District, the Act (1) imposes penalties in the guise of taxes, and (2) compels a person who endeavors to comply with the Act to give information which would incriminate him under both the District gambling laws and the Federal conspiracy statute, 18 U. S. C. 371.

The Government appealed the dismissal to the Municipal Court of Appeals for the District of Columbia, which reversed the trial court on the authority of the decision of this Court in *United States* v. *Kahriger,* 345 U. S. 22 (R. 29–33). The Court of Appeals granted a petition for allowance of appeal and affirmed the judgment of the Municipal Court of Appeals on the same grounds (R. 34–35).

## SUMMARY OF ARGUMENT

### I

In *United States* v. *Kahriger*, 345 U. S. 22, this Court upheld the very tax here involved against the contentions that it is an attempt to penalize gambling rather than a true tax and that its registration provisions would violate the Fifth Amendment to the Constitution. If the tax is valid in the United States as a whole, it must be valid in the District of Columbia, which is a part

of the United States subject to the general taxing power of the United States.

Petitioner's whole argument is based on the erroneous premise that the Federal Government may not tax an activity illegal under District of Columbia law because the mere payment of the tax would reveal acts incriminatory under federal law. This Court has made clear, however, that the Government may tax what it also forbids. *United States* v. *Stafoff*, 260 U. S. 477, 480. The tax here involved is not a tax which applies nationally only to activity which is illegal under federal law. It is a national tax applicable to all wagering, whether legal or illegal under federal law. This Court in the *Kahriger* case found that it was a revenue measure representing a proper exercise of the federal taxing power. The fact that its incidence in a particular locality is upon an activity illegal under federal law no more changes the nature of the tax as a tax than does the fact that the income tax may reach profits from illegal federal activity change the nature of that tax. The special position of the District of Columbia in the federal scheme cannot change the character of a national tax.

## II

A. The previous holdings of this Court, that the Federal Government may tax what it forbids, necessarily carry the implication that the priv-

ilege against self-incrimination does not justify the failure to pay a valid tax. As this Court pointed out in *United States* v. *Kahriger,* 345 U. S. 22, 32–33, the statute adequately informs anyone subject to its terms, before he engages in the taxed activity, that if he wishes to engage or continue in such activity, he must do so subject to its terms. His election to continue the taxed activity is a voluntary choice, and not compulsory self-incrimination.

Whether the tax is due before or after the actual placing of a wager is immaterial. It was not the due date of the tax but the effective date of the statute which gave petitioner the warning that if he engaged in the business of taking wagers, he would be subject to regulation and disclosure. The statute, which did not become effective until ten days after its enactment, gave petitioner adequate notice of its consequences.

The Fifth Amendment does not guarantee a right to engage in future criminal business activity. Since petitioner had a choice of continuing business subject to the tax or discontinuing such business, any self-incriminatory results of paying the tax, whether as to present or past activity, would represent a voluntary choice on his part, and would not be the result of compulsion. And since the tax is not one which in its nation-wide impact is limited to activity always illegal under federal law, it cannot be said that its purpose is merely to uncover illegal activity.

The tax is a nation-wide revenue measure; its impact on activity illegal in the District of Columbia is incidental.

B. Petitioner's argument that the $50 tax is retrospective in operation in that a wager must be accepted before the tax is due, while irrelevant, is also erroneous. The reference in the occupational tax to those who must pay the 10% tax on wagers actually accepted is designed merely to specify the classes of gambling entrepreneurs who must pay the occupational tax, as distinguished from those engaged in certain types of wagering not covered by the Act. When the statute is read as a whole, it is clear that the occupational tax is due before any gambling activity is commenced.

## III

Petitioner's argument that the Wagering Tax Act effects an unlawful search and seizure by requiring the taxpayer to supply information which might serve as "probable cause" for a search warrant is only a less substantial variation of the argument predicated upon the Fifth Amendment. There is, of course, no actual search and seizure; nor is there any compulsory production of private records. The posting and listing requirements relate to records required by law to be kept. Their availability to government inspection, established by *Kahriger* as a valid requirement under the Fifth Amendment, is no less proper under the Fourth. *Wilson* v. *United States*, 221 U. S. 361;

*Davis* v. *United States*, 328 U. S. 582; *Shapiro* v. *United States*, 335 U. S. 1.

## ARGUMENT

In *United States* v. *Kahriger*, 345 U. S. 22, this Court upheld the very occupational tax here involved against the contentions that it is an attempt to penalize gambling rather than a true tax, and that its registration provisions would violate the Fifth Amendment to the Constitution. Petitioner argues that, nevertheless, the tax is invalid in the District of Columbia because payment thereof would reveal activities made illegal under federal law in the District. The net effect of his argument, if sustained, would be to take the District of Columbia out of the federal taxing power as to any tax on activities which are normally regulated in the exercise of a state's police power, such as dealings in narcotics, liquor, firearms, etc. It is the Government's position that the Constitution requires no such incongruous result. The District of Columbia, though voteless, is a part of the United States subject to the general taxing power of the United States.

### I. A nation-wide revenue measure may constitutionally reach activities illegal under federal law

The foundation of petitioner's argument is the contention that the Federal Government may not tax an activity illegal under District of Columbia law because the mere payment of the tax would

reveal acts incriminatory under federal law. The elaborate argument as to the relation between the 10% tax on wagers actually placed and the $50 occupational tax, here involved,[3] on the business of engaging in wagering (Br. 6–17, 24–25) (which, as we show *infra*, pp. 20–22, is in itself fallacious), is an effort to show that the $50 tax is imposed upon illegal activities which have taken place before the tax is due. The entire argument is largely irrelevant because petitioner's basic premise is erroneous. A general nation-wide tax is not rendered invalid because of its incidence upon activities which are, as to a particular individual or individuals in a particular locality, illegal.

This Court has ruled that federal taxes on activities forbidden by federal law are legitimate exercises of Congress' taxing powers. "A law which imposes a tax on intoxicating liquor, whether legally or illegally made, is not in conflict with another law which prohibits the making of any such liquor." *United States* v. *One Ford Coupe*, 272 U. S. 321, at 327. "A tax on intoxicating liquor does not cease to be such because the sovereign has declared that none shall be manufactured, and because the main purpose in re-

[3] Of course, only the $50 occupational tax imposed by 26 U. S. C. 3290 is directly involved in the present indictment for failure to pay this tax. Petitioner has not been charged with failure to pay the 10% excise tax on wagers accepted under 26 U. S. C. 3285.

taining the tax is to make law-breaking less profitable." *Id.* at 328. In *United States* v. *Yuginovich,* 256 U. S. 450, at 462, the Court said:

> That Congress may under the broad authority of the taxing power tax intoxicating liquors notwithstanding their production is prohibited and punished, we have no question. The fact that the statute in this aspect had a moral end in view as well as the raising of revenue, presents no valid constitutional objection to its enactment.

The Court, observing that Congress had power both to tax and prohibit the same activity, concluded that such was not the Congressional intent in the situation there presented. But after passage of a Supplemental Act expressing intent to keep the tax in effect, the Court, consistently with the principles previously expressed, held the tax applicable in *United States* v. *Stafoff,* 260 U. S. 477, reiterating, "Of course Congress may tax what it also forbids." 260 U. S. at 480.

Petitioner argues that the rationale of these prohibition cases is inapplicable because under prohibition there could be some legal as well as illegal manufacture of liquor (Br. 16). But this attempted distinction serves merely to support the validity of the tax here involved. This is a national tax, applicable to all wagering, whether legal or illegal. It is admittedly valid in all parts of the United States other than places like the

District of Columbia where there are federal statutes prohibiting gambling. Thus the tax is not imposed only on activities illegal under federal law; it is imposed on certain activities whether or not they happen to be illegal under federal law. The fact that gambling happens to be unlawful under statutes enacted by Congress pursuant to its police powers over the District of Columbia no more changes the nature of the tax as a tax than does the fact that the income tax may reach profits of certain individuals from illegal federal activity change the nature of that tax.

This Court held in the *Kahriger* case that the wagering tax is a revenue measure, even though it may also have incidental regulatory effects, 345 U. S. at pp. 27–28. As is there pointed out, 345 U. S. at p. 28, the wagering tax actually produces more revenue than the narcotics and firearms taxes, upheld in such cases as *United States* v. *Doremus*, 249 U. S. 86; *Nigro* v. *United States*, 276 U. S. 332 (narcotics); *United States* v. *Sanchez*, 340 U. S. 42 (marihuana); *Sonzinsky* v. *United States*, 300 U. S. 506.[4] Thus this Court

[4] The legislative history shows that the Act was designed as a revenue measure. H. Rep. No. 586, 82d Cong., 1st Sess., p. 55 and S. Rep. No. 781, 82d Cong., 1st Sess., p. 113, state:

"Commercialized gambling holds the unique position of being a multi-billion-dollar, Nation-wide business that has remained comparatively free from taxation by either State or Federal Governments. This relative immunity from taxation has persisted in spite of the fact that wagering has many

has effectively disposed of petitioner's argument that the Act imposes a penalty rather than a tax. Manifestly, the application of a national revenue measure cannot depend on whether it actually does or does not produce revenue in any one particular locality. In fact, the constitutional questions which troubled the Court with respect to the taxes involved in the cases cited above, *i. e.,* whether the regulatory effect of such measures constituted an infringement on the police powers reserved to the states, do not apply to the District of Columbia since in that area Congress does have police power. *Atlantic Cleaners and Dyers* v. *United States,* 286 U. S. 427.

The fallacy of petitioner's argument is that it treats this tax as if it were imposed in the District of Columbia alone and considers the tax as one on activity which must always be illegal under federal law. This is, however, a nation-wide tax, designed to produce and actually producing revenue. Its particular incidence in the District of Columbia is a fortuitous result of the

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characteristics which make it particularly suitable as a subject for taxation. Your committee is convinced that the continuance of this immunity is inconsistent with the present need for increased revenue, especially at a time when many consumer items of a seminecessity nature are being called upon to bear new or additional tax burdens."

And H. Rep. No. 586 at p. 60 and S. Rep. No. 781 at p. 118, both say:

"The committee conceives of the occupational tax as an integral part of any plan for the taxation of wagers and as essential to the collection and enforcement of such a tax."

special position of the District of Columbia. That special circumstance does not, however, alter the fact that the tax is a valid exercise of the taxing power of the United States, applicable to the whole of the United States, including the District of Columbia.

### II. The privilege against self-incrimination does not justify the failure to pay the tax

#### A. Before any tax was due, the statute informed petitioner that if he continued in the wagering business, he would be subject to taxation and regulation

The cases discussed above, in which this Court has held that the federal government may tax what it forbids, necessarily carry the implication that the privilege against self-incrimination does not justify the failure to pay a valid tax. *United States* v. *Stafoff*, 260 U. S. 477; *United States* v. *One Ford Coupe*, 272 U. S. 321, 327; *United States* v. *Sullivan*, 274 U. S. 259, 263. Although the question of privilege was not discussed in most of the cases and was not reached in the *Sullivan* case because it was held to have been prematurely raised, the upholding of the taxing power as to illegal activities necessarily implies that the tax must be paid. The rationale which must underlie such rulings was succinctly stated by this Court in the *Kahriger* case, 345 U. S. at pp. 32–33, as follows:

> Under the registration provisions of the wagering tax, appellee is not compelled to

> confess to acts already committed, he is merely informed *by the statute* that in order to engage in the business of wagering in the future he must fulfill certain conditions. [Emphasis added.]

See also the New York case of *E. Fougera & Co. Inc.* v. *City of New York,* 224 N. Y. 269, cited by the Court in the *Kahriger* opinion in support of the above holding (345 U. S. at 33, fn. 13). In the *Fougera* case, a city ordinance required dealers in patent medicines to register the names of ingredients for which therapeutic effects were claimed with the Department of Health. It was stipulated by the parties that the objective of the ordinance was to secure information on which to base prosecutions for violations of law. 224 N. Y. at 278. To the contention that this ordinance violated the plaintiff's privilege against self-incrimination, the court, per Cardozo, J., replied (p. 279):

> The sale of medicines is a business subject to governmental regulation. One who engages in it is not compelled by this ordinance to expose himself to punishment for any offense already committed. *He is simply notified of the conditions upon which he may do business in the future. He makes his own choice. To such a situation, the privilege against self-accusation has no just application.* [Emphasis added.]

Petitioner misconceives the import of this holding by his argument that it applies only where the

tax must be paid before the illegal act is done and by his attempt to show that in this case the tax is not due until after an illegal act has occurred. It is not the due date of the tax but the effective date of the statute which is controlling. It is the statute which gave petitioner the warning that if he engaged in the business of taking wagers, he would be subject to regulation and disclosure. That this is so is shown by the Court's reference, in footnote 13 of the *Kahriger* opinion (345 U. S. at 33), to the cases holding that records required by law to be kept are not within the privilege. *Davis* v. *United States,* 328 U. S. 582, 590; *Shapiro* v. *United States,* 335 U. S. 1, 35. Manifestly, the records actually kept in such cases would, for the most part, relate to transactions which had occurred before the entries were made, and certainly before any attempt would be made to use them for incriminatory purposes.

Whether the tax is due before or after the actual placing of a wager is thus immaterial. The statute in this case gave petitioner ample warning of its consequences. The Act was passed on October 20, 1951. 65 Stat. 529. Its provisions became effective November 1, 1951, as to both taxes on wagers and the occupational tax.[5] If petitioner was engaged in business on October 20, the earliest requirement to register gave him ten

[5] Section 472, Revenue Act of 1951, 65 Stat. 452, 531, Appendix, *infra*, pp. 38–39.

days to elect whether or not to register and pay the occupational tax. The tax thus did not apply to past gambling activities but to activities which petitioner might elect to continue or commence after November 1, 1951. Petitioner was informed before he ever accepted any wager after November 1, 1951, that if he wished to engage in this business he would have to pay both the $50 occupational and 10% tax.

It is unsound to argue, as petitioner does, that if he committed certain crimes after November 1st, the excise tax on these transactions would be unconstitutional when the time came to make a tax report because the transactions would then be in the past. On this basis no income tax on illegal activities could be collected because the income would have been earned before the tax was due.

No one forced petitioner to engage in the wagering business after November 1. When he elected to remain in the business, he did so with full knowledge that the Federal Government had imposed a tax on this occupation. He could not elect to continue in the business and reject the tax burdens which Congress had placed upon it. "[T]here is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in future be criminal at the choice of the party reporting." 8 Wigmore, *Evidence* (3rd ed.) 1940, Sec. 2259c.

The prospective character of the Act and the voluntary nature of the "reporting" likewise dispose of petitioner's claim that registration for the occupation tax would incriminate him of a conspiracy to violate District of Columbia laws against gambling in that registration to obtain the stamp might constitute an overt act of such conspiracy. He again ignores the fact that he had an election to be made between October 20 and November 1 whether or not to go into the gambling business or continue therein. And, again, if it be conceded that his only means of avoiding the penalty for crime was to discontinue it, or not commence it, the short answer is that the Fifth Amendment does not guarantee a right to engage in future criminal business activity.

The logical result of petitioner's position, that activity forbidden by federal law in a particular locality cannot be taxed, would be that no tax on activities made illegal in the exercise of Congressional police power in the District of Columbia would be collectible in the District of Columbia. A great many activities, which are in the states punishable only under state law, such as robbery and blackmail, are offenses under the D. C. Code. That certainly cannot mean that the income obtained from such illegal activities is taxable everywhere but in the District of Columbia. Cf. *Rutkin* v. *United States,* 343 U. S. 130. The D. C. Code, Title 33, Sections 401 through 425 (the Uniform Narcotic Drug Act), forbids posses-

sion or sale of narcotics except as authorized in that Act. This does not mean that the federal Harrison Act taxing narcotics, which in operation is closely analagous to the Wagering Tax Act,* does not apply in the District. Prosecutions thereunder have been sustained without question. *E. g., Coates* v. *United States,* 186 F. 2d 338 (C. A. D. C.); *Dear Check Quong* v. *United States,* 160 F. 2d 251 (C. A. D. C.). To petitioner's argument that the District of Columbia Narcotic Drug Act allows certain forms of dealing in drugs, whereas gambling is entirely prohibited in the District, the answer is that illegal traffic in the District is entirely forbidden. For illegal traffic would be the only kind under consideration with respect to anyone who, like petitioner, would be claiming an unconstitutional

* 26 U. S. C. 3220 of the Code imposes a special tax ranging from $1 to $24 on "every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium, coca leaves, * * * or any * * * derivative * * * thereof." To facilitate administration, Section 3221 requires such persons to register with the Collector of the District in which their businesses are located, their names or styles, places of business, and places where such business is to be carried on. Both registration and tax payment are to be effected, as in the Wagering Tax Act, on or before July 1st of each year. Section 3224 then makes it unlawful (with certain exceptions not here relevant) for any person who has not registered and paid the special tax, to traffic in, or transport or possess narcotic drugs. Sections 2550 through 2565 impose taxes on the drugs themselves and require tax stamps to evidence payment and use of government order forms on transfer.

conflict between the national and the local act, since unconstitutional operation as to *the complainant* must be alleged. Moreover, as we have hitherto pointed out, the tax here involved, as a national tax, is not imposed on an activity which is wholly illegal under federal law. It is imposed on a general activity, and the fact that such activity happens to be illegal in the District of Columbia is incidental.

Petitioner also argues that even if the act be deemed to operate prospectively, registration might furnish "leads" to prosecutors as to former gambling activity, thus violating the Fifth Amendment. Again the conclusive answer is that there is no compulsion to furnish any information since petitioner has the alternative of discontinuing business, and voluntary self-incrimination has no relation to the Fifth Amendment.

It is well to emphasize here that, as we have discussed in Point I, this is not a tax on an activity illegal throughout the nation under federal law. Petitioner's whole argument is based on the assumption that this tax is equivalent to a tax on acts which are national federal crimes, such as robbery of a national bank or espionage. Were that the case there might be a serious question, both as to whether it would be a true tax and not a penalty, and whether it could have any purpose other than self-incrimination. But that is not this case. This is a national tax which

this Court has found to be a revenue measure. Its character as such does not change because of its impact in the District of Columbia, where Congress, functioning much like a state legislature, has outlawed gambling, as has the legislature of practically every state. If the tax is valid in the United States as a whole it must be valid in the District of Columbia, which is part of the United States. The incidental illegality under District of Columbia law is irrelevant. Illegality of source of income has never freed a taxpayer from liability for taxes. *Rutkin* v. *United States*, 343 U. S. 130, 137, 140; *Johnson* v. *United States*, 318 U. S. 189; *United States* v. *Sullivan*, 274 U. S. 259; *United States* v. *One Ford Coupe*, 272 U. S. 321, 327; *United States* v. *Yuginovich*, 256 U. S. 450, 462; *United States* v. *Stafoff*, 260 U. S. 477, 480.

**B. The $50 occupational tax is prospective in operation**

While, as noted above, we regard it as immaterial whether the $50 tax on the business of wagering is due before or after a wager is accepted, since the statute itself was prospective in operation, it should be noted that the $50 tax is in fact prospective in application. The Act specifically provides for registration and payment of the special tax *before any* gambling activity is commenced. Thus, 26 U. S. C. 3271, made applicable by 26 U. S. C. 3292, provides:

> SECTION 3271. *Payment of tax.*
>
> (a) *Condition precedent . . doing business.* No person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor in the manner provided in this chapter.

And Section 3294 provides:

> *Failure to Pay Tax.* Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

Ignoring the plain meaning of this language, petitioner advances an involved and fallacious analysis to support his thesis that the statute calls for retrospective reporting of crime. His argument runs as follows: Since the statute says (Section 3290) that the $50 tax shall be paid by persons liable for paying the tax on wagers (Section 3285), and since under Section 3285 and Treasury Regulations 132, Section 325.25, there is no tax due on these wagers until one has been accepted, therefore registration (Section 3291) and the special $50 tax on the business of wagering are not due until a wager has been accepted. There is thus, he argues, a required reporting of past crimes. The complete answer, as discussed above, is the fact that the Act was set up with a future effective date as to both the 10% tax

and as to the special $50 tax. But even on petitioner's mistaken theory that the $50 occupational tax would be invalid if it were not due until after wagers had been accepted, his argument fails. For the reference to subpart A (Section 3285)—*i. e.*, to persons liable for the 10% excise tax—in the occupational tax and registration sections is obviously designed merely to identify the classes of gambling entrepreneurs subject to the tax with the classes of wagers coming within the tax, as opposed to certain types of wagering not covered by the Act. To read this reference as having a time connotation ignores the remainder of the statute. It ignores particularly the provision (Section 3271 (a), quoted *supra* p. 21) which states precisely that the tax is due before any wagers are accepted.

It may be observed, moreover, that if petitioner's erroneous theory and strained construction were more persuasive than they are, there could still be no justification for preferring his interpretation to the clear language of the occupational tax requirement. Statutes should be read to save, not to destroy, what Congress wrote. *United States* v. *Harriss*, 347 U. S. 612, 618. This principle has special force where the plain statutory language effects a valid result.

In sum, the Act is prospective in operation and presents no valid ground of complaint under the Fifth Amendment. The privilege against self-

incrimination applies retrospectively for the protection of persons accused of crime, not *in futuro* for that of persons desirous of launching a criminal enterprise under its aegis. Petitioner is in effect contending for a right to violate local gambling laws free of the restraints which are incidental effects of the tax. To uphold his contention it would have to be said that where Congress has taxed a field of activity presumed fruitful, certain citizens have a right to exemption from the tax burden because their occupations are criminal enterprises. This Court's decisions refute such an argument.

**III. The posting and listing provisions of the Wagering Tax Act do not constitute an unlawful search and seizure prohibited by the Fourth Amendment**

The brief argument petitioner predicates upon the Fourth Amendment (Pet. Br. 5, 17–18) is but a weaker variant of his contention that the Wagering Tax Act infringes his privilege against self-incrimination. He claims that the posting and listing provisions of the Act supply evidence of his alleged gambling activities; that such evidence could supply the "probable cause" required for a search warrant; and that the result is somehow an unlawful search and seizure. But the decisive answer to the self-incrimination point, discussed above and settled by *Kahriger*, is *a fortiori* determinative here. Petitioner cannot complain that payment of the valid federal tax (and

compliance with the valid regulations enforcing such payment) may incriminate him; there is obviously even less substance in the objection that the information required for collection of the tax might serve as a basis for a search warrant.[7]

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[7] It should be noted that, insofar as it is predicated upon the requirement that the wagering tax stamp be posted in the taxpayer's place of business (26 U. S. C. 3293, *infra*, p. 35), petitioner's Fourth Amendment argument is not properly in this case. He is not charged with failure to post the stamp, but with failure to pay the tax, as he must do before he receives a stamp to post. While the Fifth Amendment rather than the Fourth was involved, this Court's opinion in *United States* v. *Kahriger*, 345 U. S. 22, would seem to be conclusive against petitioner's right to complain of the posting requirement. The Court there said (p. 32):

> Since appellee failed to register for the wagering tax, it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law is called for. In *United States* v. *Sullivan*, 274 U. S. 259, defendant was convicted of refusing to file an income tax return. It was assumed that his income "was derived from business in violation of the National Prohibition Act." *Id.*, at 263. "As the defendant's income was taxed, the statute of course required a return. See *United States* v. *Sischo*, 262 U. S. 165. In the decision that this was contrary to the Constitution we are of opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." 274 U. S., at 263.

That declaration, peculiarly apposite here, is of course only a specific application of the principle that the Court will avoid constitutional adjudication except in cases requiring it. *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568 *et seq.*

Since the claim is neither made, nor could be, that the posting and filing are actual searches or seizures, petitioner's argument is actually a fanciful extension of the search and seizure prohibition. The argument would say that a search warrant, though issued upon probable cause and otherwise fully complying with Fourth Amendment standards, would be illegal if a tax return had disclosed any information contributing to the probable cause for the warrant. This is plainly a long step from the doctrine that a compulsory production of books or papers may amount to a search and seizure, *Boyd* v. *United States,* 116 U. S. 616. And the error of the argument becomes especially apparent when it is recalled that the *Boyd* doctrine applies only to ban compulsory production of *private* books or papers, whereas the posting provisions relate to documents of a public character.

This Court clearly stated in the *Boyd* case, 116 U. S. at 623, that

> * * * the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures.

Since the Wagering Tax Act, as held in *Kahriger,* is clearly a revenue measure, the requirement for

posting and exhibition for use of the officers of the Bureau of Internal Revenue comes squarely within this principle. And the requirement of Section 3275 that each Director of Internal Revenue keep a list of taxpayers for public inspection, with provision for furnishing of copies thereof, "as of a public record," to prosecuting officers of state, county, or municipality, comes within the same exception to the Fourth Amendment privilege.

Both posting and listing requirements are also within the broader rule which *Boyd* foreshadowed, the rule governing records required to be kept for a governmental purpose. This principle first evolved out of federal revenue law and the powers inherent in its constitutional basis, but has been recognized as applicable to other records required to be kept on activities subject to legitimate federal regulation. *Wilson* v. *United States,* 221 U. S. 361; *Davis* v. *United States,* 328 U. S. 582; *Shapiro* v. *United States,* 335 U. S. 1. The rationale of the rule is that an overriding public purpose in the record-keeping requirement removes that privacy the violation of which is deemed destructive of the Fourth Amendment's privilege. "The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of re-

strictions validly established. There the privilege, which exists as to private papers, cannot be maintained." *Wilson* v. *United States, supra* at 380, quoted in *Shapiro, supra,* at 17.[8]

It is to be observed, finally, that petitioner's theory would not only affect the posting and listing provisions but would bar any requirement of the Wagering Tax Act which might provide leads for issuance of a warrant. For example, the registration provisions themselves would give all the leads necessary for probable cause since such information is made available to prosecution officers.[9] As we have indicated, it is apparent, especially in light of the *Kahriger* decision, that petitioner's Fourth Amendment argument is in essence merely his self-incrimination argument viewed from the physical aspect of the stamp on the wall and the list in the Director's office. The search and seizure argument of "leads" for probable cause for a search warrant is subject to the

[8] In *Davis* v. *United States, supra,* at 593, the Court, speaking of the claimed illegal search and seizure there involved, noted also the difference between a search of a home and a place of business:

"Where the officers seek to inspect *public* documents at the place of business where they are required to be kept, permissible limits of persuasion are not so narrow as where *private* papers are sought."

This distinction is apposite to the claimed search and seizure constituted by the posting of the tax stamp at petitioner's place of business and the maintenance of the list of taxpayers at the office of the Director of Internal Revenue.

[9] 26 U. S. C. 3275 (Appendix, *infra,* p. 38).

same answers as the argument of unconstitutional self-incrimination.[10] Whatever its form, the contention is merely an attempt to clothe in varying terms petitioner's basic and untenable position that a tax on an illegal business is unconstitutional.

## CONCLUSION

The issues raised come within the holding of the Court in *United States* v. *Kahriger*, 345 U. S. 22, and there is nothing in petitioner's position to justify an exception to that ruling. It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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DECEMBER 1954.

[10] In *Irvine* v. *California*, 347 U. S. 128, this Court rejected the contention that the gambling tax stamp found on petitioner's person on arrest and other documentary evidence from the Bureau of Internal Revenue constituted privileged materials, thus assuming the constitutionality of the statutory requirement.

# APPENDIX

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be compelled in any criminal case to be a witness against himself * * *.

The Internal Revenue Code of 1939, as amended,[11] provides in pertinent part as follows:

CHAPTER 27A—WAGERING TAXES

SUBCHAPTER A—TAX ON WAGERS

**Sec. 3285. Tax.**

(a) *Wagers*—There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

[11] See footnote 1 *supra*, p. 2.

(b) *Definitions*—For the purposes of this chapter—

(1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers. (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers-game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) *Amount of Wager.*—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the per-

son placing such wager, the amount so collected shall be excluded.

(d) *Persons Liable for Tax.*—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

(e) *Exclusions From Tax.*—No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267.

(f) *Territorial Extent.*—The tax imposed by this subchapter shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (A) with a person who is a citizen or resident of the United States, or (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States.

**Sec. 3286. Credits and refunds.**

(a) No overpayment of tax under this subchapter shall be credited or refunded (otherwise than under subsection (b)), in pursuance of a court decision or other-

wise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Secretary, (1) that he has not collected (whether as a separate charge or otherwise) the amount of the tax from the person who placed the wager on which the tax was imposed, or (2) that he has repaid the amount of the tax to the person who placed such wager, or unless he files with the Secretary written consent of the person who placed such wager to the allowance of the credit or the making of the refund. In the case of any laid-off wager, no overpayment of tax under this subchapter shall be so credited or refunded to the person with whom such laid-off wager was placed unless he establishes, in accordance with regulations prescribed by the Secretary, that the provisions of the preceding sentence have been complied with both with respect to the person who placed the laid-off wager with him and with respect to the person who placed the original wager.

(b) Where any taxpayer lays off part or all of a wager with another person who is liable for tax under this subchapter on the amount so laid off, a credit against the tax imposed by this subchapter shall be allowed, or a refund shall be made to, the taxpayer laying off such amount. Such credit or refund shall be in an amount which bears the same ratio to the amount of tax which such taxpayer paid under this subchapter on the original wager as the amount so laid off bears to the amount of

the original wager. Credit or refund under this subsection shall be allowed or made only in accordance with regulations prescribed by the Secretary; and no interest shall be allowed with respect to any amount so credited or refunded.

**Sec. 3287. Certain provisions made applicable.**

All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax imposed by this subchapter. In addition to all other records required pursuant to section 2709, each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable.

SUBCHAPTER B—OCCUPATIONAL TAX

**Sec. 3290. Tax.**

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.

**Sec. 3291. Registration.**

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

**Sec. 3292. Certain provisions made applicable.**

Sections 3271, 3273 (a), 3275, 3276, 3277, 3279, and 3280 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation described in

chapter 27. No other provision of subchapter B of chapter 27 shall so extend or apply.

**Sec. 3293. Posting.**

Every person liable for special tax under this subchapter shall place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person, and exhibit it, upon request, to any officer or employee of the Bureau of Internal Revenue.

**Sec. 3294. Penalties.**

(a) *Failure to Pay Tax*—Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

(b) *Failure to Post or Exhibit Stamp*—Any person who, through negligence, fails to comply with section 3293, shall be liable to a penalty of $50, and the cost of prosecution. Any person who, through willful neglect or refusal, fails to comply with section 3293, shall be liable to a penalty of $100, and the cost of prosecution.

(c) *Willful Violations*—The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter.

SUBCHAPTER C—MISCELLANEOUS PROVISIONS

**Sec. 3297. Applicability of federal and state laws.**

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

**Sec. 3298. Inspection of books.**

Notwithstanding section 3631, the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter.

* * * * *

**Sec. 3271. Payment of tax.**

(a) *Condition Precedent To Doing Business.* No person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor in the manner provided in this chapter.

(b) *Due Date.* All special taxes shall become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year, and in the latter case it shall be

reckoned proportionately, from the 1st day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

(c) *How Paid*

(1) Stamp. All special taxes imposed by law, including the tax on stills or worms, shall be paid by stamps denoting the tax.

(2) Assessment

* * * * *

**Sec. 3273. Stamps.**

(a) *Supply.* The Commissioner is required to procure appropriate stamps for the payment of all special taxes imposed by law, including the tax on stills or worms; and the provisions of section 2802 (a) and of sections 3300, 3301, and 3302, and all other provisions of law relating to the preparation and issue of stamps for distilled spirits, fermented liquors, tobacco, and cigars, shall, so far as applicable, extend to and include such stamps for special taxes; and the Commissioner shall have authority to make all needful regulations relative thereto.

* * * * *

**Sec. 3275. List of special taxpayers for public inspection.**

(a) *In Collector's Office.* Each collector shall, under regulations of the Commissioner, place and keep conspicuously in his office, for public inspection, an alpha-

betical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality, he shall furnish a certified copy thereof, as of a public record, for which a fee of $1 for each one hundred words or fraction thereof in the copy or copies so requested, may be charged.

Section 472, Revenue Act of 1951, 65 Stat. 452, 531, provides as follows.

Effective date of Part VII

The tax imposed by subchapter A of chapter 27A, as added by section 471, shall apply only with respect to wagers placed on or after the first day of the first month which begins more than 10 days after the date of enactment of this Act. No tax shall be payable under subchapter B of chapter 27A, as added by section 471, with respect to any period prior to the first day of the first month which begins more than 10 days after the date of enactment of this Act. In the case of any person who is liable for tax under subchapter A of chapter 27A, as added by section 471, or who is engaged in receiving wagers for or on behalf of any person so liable, and who commenced the activity which makes him subject to such tax, or who was engaged in receiving such

wagers, prior to the first day of the first month specified in the preceding sentence, the tax under subchapter B of chapter 27A, as added by section 471, shall be reckoned proportionately from the first day of such month to and including the thirtieth day of June following and shall be due on, and payable on or before, the last day of the month specified in the preceding sentence.

Title 22, D. C. Code, 1951 ed., Sections 1501, 1502, 1503, 1508 provide:

SEC. 22–1501 [6:151]. LOTTERIES—PROMOTION—SALE OR POSSESSION OF TICKETS

If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery

or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

SEC. 22–1502 [6:151a]. POSSESSION OF LOTTERY OR POLICY TICKETS

If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both.

SEC. 22–1503 [6:152]. PERMITTING SALE OF LOTTERY TICKETS ON PREMISES.

If any person shall knowingly permit, on any premises under his control in the Dis-

trict, the sale of any chance or ticket in or share of a ticket in any lottery or policy lottery, or shall knowingly permit any lottery or policy lottery, or policy shop on such premises, he shall be fined not less than fifty dollars nor more than five hundred dollars, or be imprisoned not more than one year, or both.

SEC. 22–1508 [6: 157]. GAMBLING POOLS AND BOOK MAKING

It shall be unlawful for any person or association of persons to bet, gamble, or make books or pools on the result of any trotting or running race of horses, or boat race, or race of any kind, or on any election, or any contest of any kind, or game of baseball. Any person or association of persons violating the provisions of this section shall be fined not exceeding five hundred dollars or be imprisoned not more than ninety days, or both.

Treasury Regulations 132 relating to Excise and Special Tax on Wagering under Chapter 27A of the Internal Revenue Code provide in pertinent part:

SEC. 325.20. EFFECTIVE PERIOD. The tax on wagers imposed by section 3285 is effective with respect to wagers placed on or after November 1, 1951.

SEC. 325.21. SCOPE OF TAX. (a) Section 3285 imposes a tax on (1) all wagers placed with a person engaged in the business of

accepting wagers upon the outcome of a sports event or a contest; (2) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit; and (3) any wager placed in a lottery conducted for profit.

(b) A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted. It is not intended that to be engaged in the business of accepting wagers a person must be either so engaged to the exclusion of all other activities or even primarily so engaged. Thus, for example, an individual may be primarily engaged in business as a salesman, and also for the purpose of the tax be engaged in the business of accepting wagers.

* * * * *

SEC. 325.24. PERSON LIABLE FOR TAX.

(a) Every person engaged in the business of accepting wagers with respect to a sports event or a contest is liable for the tax on any such wager accepted by him. Every person who operates a wagering pool or lottery conducted for profit is liable for the tax with respect to any wager or contribution placed in such pool or lottery. To be liable for the tax, it is not necessary that the person engaged in the business of accepting wagers or operating a wagering

pool or lottery physically receive the wager or contribution. Any wager or contribution received by an agent or employee on behalf of such person shall be considered to have been accepted by and placed with such person.

(b) If a person engaged in the business of accepting wagers or conducting a lottery or betting pool for profit lays off all or part of the wagers placed with him with another person engaged in the business of accepting wagers or conducting a betting pool or lottery for profit, he shall, notwithstanding such lay-off, be liable for the tax on the wagers or contributions initially accepted by him. See section 325.34 for the credit and refund provisions applicable with respect to laid-off wagers.

SEC. 325.25. WHEN TAX ATTACHES. (a) The tax attaches when (1) a person engaged in the business of accepting wagers with respect to a sports event or a contest, or (2) a person who operates a wagering pool or lottery for profit, accepts a wager or contribution from a bettor. In the case of a wager on credit, the tax attaches whether or not the amount of the wager is actually collected from the bettor.

* * * * *

SEC. 325.30. RETURNS. (a) Every person required to pay the tax on wagers imposed by section 3285 of the Code shall prepare each month from the daily records required by section 325.32 a return, in

duplicate, on Form 730 in accordance with the instructions thereon. The original return, together with the amount of the tax, shall be filed with the collector of internal revenue for the district in which is located the office or principal place of business of the person required to make the return. If such person resides in the United States, but has no office or principal place of business in the United States, the return shall be filed with the collector of internal revenue for the district in which he resides. If such person has no office, residence, or principal place of business in the United States, the return shall be filed with the collector at Baltimore, Md. The return shall be filed on or before the last day of the month following that for which it is made.

(b) When the last day of the month in which a return and payment are due falls on Sunday or a legal holiday, the return may be filed and payment made on the next secular or business day. A return shall be forwarded to the collector for each month whether or not any liability has been incurred for that month. If a taxpayer ceases operations which make him liable for tax, the last return shall be marked "Final return".

SEC. 325.31. PAYMENT OF TAXES. All taxes are due and payable to the collector of internal revenue, without assessment by the Commissioner or notice from the col-

lector, at the time fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 6 percent per annum from the time the tax became due to the actual date of payment or assessment, whichever is earlier. For provisions with respect to interest generally, including interest on assessments, see section 325.36.

SEC. 325.32. RECORDS—(a) *In general.* (1) Every person required to pay the excise tax imposed by section 3285 shall keep, or cause to be kept, at his office or principal place of business, or, if he has no office or principal place of business, at his residence or some other convenient or safe location, such records as will clearly show as to each day's operation:

(A) The gross amount of all wagers accepted;

(B) The gross amount of each class or type of wager accepted on each separate event, contest, or other wagering medium. For example, in the case of wagers accepted on a horse race, the daily record shall show separately the gross amount of each class or type of wagers (straight bets, parlays, "if" bets, etc.) accepted on each horse in the race. Similarly, in the case of the numbers game, the daily record shall show the gross amount of each class or type of wagers accepted on each number;

(C) Separately, the gross amount of wagers—

(i) accepted directly by the taxpayer or at any registered place of business of the taxpayer (other than laid-off wagers),

(ii) accepted for his account by agents at any place other than a registered place of business of the taxpayer (other than laid-off wagers), and

(iii) accepted as laid-off wagers from persons subject to the excise tax;

(D) With respect to wagers laid off with others, the name, address, and registration number of each person with whom the laid-off wagers were placed, and the gross amount laid off with each such person, showing separately the gross amount of laid-off wagers with respect to each event, contest, or other wagering medium. For example, the daily record shall show the gross amount laid off on each horse in a race; and

(E) The gross amount of tax collected from or charged to bettors as a separate item.

(2) If a taxpayer has any agents or employees receiving wagers on his behalf, he shall maintain a separate record showing the name and address of each agent or employee, the period of employment, and the number of the special tax stamp issued to each such agent or employee.

(3) A duplicate copy of each return required by section 325.30 shall be retained as part of the taxpayer's records.

(b) *Period for retaining records.* The records required by this section shall, at all

times, be open for inspection by internal revenue officers, and they shall be maintained for a period of at least four years from the date the tax became due.

SEC. 325.40. EFFECTIVE DATE OF TAX. The special tax imposed by section 3290 of the Internal Revenue Code is effective on and after November 1, 1951.

SEC. 325.41. PERSONS LIABLE FOR TAX. Every person who is liable for the 10 percent excise tax imposed on wagers by section 3285 of the Internal Revenue Code and every person who is engaged in receiving wagers for or on behalf of any other person so liable is liable for the special tax.

*Example* (*1*). A is engaged in the business of accepting horse race bets. He employs ten persons to receive on his behalf wagers which are transmitted by telephone. He also employs a secretary and bookkeeper.

A and each of the ten persons who receive wagers by telephone are liable for the special tax. The secretary and bookkeeper are not liable unless they also receive wagers for A.

*Example* (*2*). B operates a numbers game. He has an arrangement with ten persons, who are employed in various capacities, such as bootblacks, elevator operators, news dealers, etc., to receive wagers from the public on his behalf. B also employs a person to collect from his agents the wagers received on his behalf.

B, his ten agents, and the employee who

collects the wagers received on his behalf are each liable for the special tax.

SEC. 325.42. RATE AND COMPUTATION OF TAX. (a) A tax of $50 per year is imposed upon each person liable for the tax. A person engaged both in accepting wagers on his own account and in receiving wagers for or on behalf of some other person is required to purchase but one special tax stamp.

(b) The tax year begins July 1 and ends June 30. Persons commencing business between August 1 and June 30 (both dates inclusive) shall pay a proportionate part of the annual tax. "Commencing business" means the initial acceptance of a wager by a person liable for the 10 percent excise tax or the initial receiving of a wager by an agent or employee for or on behalf of some other person. Persons in business for only a portion of a month are liable for tax for the full month, i. e., a person first becoming subject to the special tax on, for example, the 20th day of a month, is liable for tax for the entire month. As the tax became effective on November 1, 1951, persons in business on that date or commencing business during that month are liable for the tax for the eight months of the year ending the following June 30.

SEC. 325.50. REGISTRY, RETURN, AND PAYMENT OF TAX. (a) Every person engaging in the business of accepting wagers and liable to the 10 percent excise tax imposed by section 3285 of the Internal Revenue

Code (see section 325.24 of these regulations) and every person engaged in receiving wagers for or on behalf of any person so liable shall on or before the last day of the month in which business is commenced file a return on Form 11–C. The return shall be filed with the collector of internal revenue for the district in which is located the taxpayer's office or principal place of business. If such taxpayer resides in the United States, but has no office or principal place of business in the United States, the return shall be filed with the collector of internal revenue for the district in which he resides. If the taxpayer has no office, residence, or principal place of business in the United States, the return shall be filed with the Collector of Internal Revenue, Baltimore, Md. The collector, upon request, will furnish to the taxpayer the proper forms which shall be filled out and signed as indicated therein.

(b) Every person engaged on November 1, 1951, in any business which makes him subject to the special tax, or first engaging in such business during the month of November 1951, shall register and file a return on Form 11–C and pay the tax on or before November 30, 1951. Thereafter, such person shall register, file a return, and pay the tax on or before the last day of July of each year.

(c) Each return shall show the taxpayer's full name. A person doing business under an alias, style, or trade name

shall give his true name, followed by his alias, style, or trade name. In the case of a partnership, association, firm, or company, other than a corporation, the style or trade name shall be given, also the true name of each member and his place of residence. In the case of a corporation, the true name and title of each officer and his place of residence shall be shown.

(d) Each person engaged in the business of accepting wagers on his own account shall furnish the name and address of each place where such business is conducted, together with the true name and residence address of each agent or employee accepting wagers on his behalf. Each agent or employee of a person accepting wagers shall furnish the name and residence address of each person (i. e., individual, partnership, corporation, etc.) on whose behalf such wagers are accepted.

SEC. 325.51. RECORDS OF AGENT OR EMPLOYEE. Every person who is engaged in receiving wagers of a type described in section 325.21 for or on behalf of another person (at any place other than a registered place of business of such other person), shall keep a record showing for each day (1) the gross amount of such wagers received by him, (2) the amount, if any, retained as a commission or as compensation for receiving such wagers, and (3) the amount turned over to the person on whose behalf the wagers were received, and the name and address of such person. The

records required by this section shall, at all times, be open for inspection by internal revenue officers, and they shall be maintained for a period of at least four years from the date the wager was received.

SEC. 325.52. TAX PAYMENT EVIDENCED BY SPECIAL TAX STAMP. (a) Upon receipt of a return, on Form 11–C, together with remittance of the full amount of tax due, the collector will issue a special tax stamp as evidence of payment of the special tax. Such payment shall be made only in the form of cash, certified check, cashier's check, or money order.

(b) Collectors will distinctly write or print on the stamp before it is delivered or mailed to the taxpayer the following information: (1) the taxpayer's registered name, and (2) the business or office address of the taxpayer if he has one; if not, the residence address. Special tax stamps will be transmitted by ordinary mail, unless it is requested that they be transmitted by registered mail, in which case additional cost to cover registry fee shall be remitted with the return.

(c) Collectors and their deputies are forbidden to issue receipts in lieu of stamps representing the payment of special taxes.

SEC. 325.53. SPECIAL TAX STAMP TO BE POSTED. The special tax stamp issued to a taxpayer as evidence of the payment of the tax shall be kept posted conspicuously in his principal place of business, except that if he has no such place of business he

shall keep such stamp on his person and exhibit it, upon request, to any officer or employee of the Bureau of Internal Revenue. Any person who, through negligence, fails to post the special tax stamp in his principal place of business, or who fails to keep the special tax stamp on his person in the event he has no business address, shall be liable to a penalty of $50 and the cost of prosecution. If through willful neglect or refusal, any person fails to comply with the provisions of section 3293, he shall be liable to a penalty of $100 and the cost of prosecution.

SEC. 325.54. CERTIFICATES IN LIEU OF STAMPS LOST OR DESTROYED. When a special tax stamp has been lost or destroyed, such fact shall be reported to the collector at once for the purpose of obtaining from him a certificate of payment. Such certificate shall be posted in place of the stamp; otherwise liability as above indicated for failure to post the stamp will be incurred. (See section 325.53.)

SEC. 325.60. DOING BUSINESS IN VIOLATION OF FEDERAL OR STATE LAW. Payment of any special tax within the scope of these regulations in nowise authorizes the carrying on of any business in violation of a law of the United States or the law of any State. The special tax stamp is not a license or permit and affords no protection from prosecution for violation of any Federal or State law.

SEC. 325.61. PUBLIC RECORD OF SPECIAL TAXPAYERS. The list required by the above section shall be kept on Record 10, and may be inspected in the collector's office at reasonable and proper times.

U. S. GOVERNMENT PRINTING OFFICE: 1954

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

No. 203

FRANK LEWIS, *Petitioner*

v.

UNITED STATES OF AMERICA

## PETITION FOR REHEARING

WALTER E. GALLAGHER
821 Fifteenth Street, N. W.
Washington, D. C.

MYRON G. EHRLICH
Columbian Building
Washington, D. C.

Printed by Byron S. Adams

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

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FRANK LEWIS, *Petitioner*

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UNITED STATES OF AMERICA

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## PETITION FOR REHEARING

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Petitioner respectfully petitions the Court for a rehearing in this cause, or, at the least, a modification of its opinion hereinbefore rendered (75 S. Ct., p. 415). The information filed in this cause by the United States in the Municipal Court for the District of Columbia on October 7, 1952 (R-1) charged in pertinent part as follows:

> "*Frank Lewis on December 13, 1951, and on diverse other days thereafter during the month of December, 1951,* in the District of Columbia engaged in the business of accepting wagers, by reason of such activity he was required by law to pay the occupational tax (wagering) of Fifty Dollars ($50.00) as imposed by Section 3290 of Internal Revenue Code, he failed to pay said tax, all in violation of Section 3294(a) In-

> ternal Revenue Code: Title 26, U. S. Code, Section 3294(a) and Section 2707(a) Internal Revenue Code as made applicable by Section 3294(c) Internal Revenue Code." (Italics supplied)

This Court apparently did not realize from the language employed in this information that this petitioner was not arrested in December, 1951, for failing to have purchased a wagering stamp. *This petitioner was arrested on December 19, 1951, for alleged violations of Sections 1501 and 1502 of Title 22 of the District of Columbia Code, which sections make it a criminal offense to operate lotteries (pages 16-17).* A copy of the certified copy of the record of the United States District Court for the District of Columbia with respect to these charges is found at pages 10-15. It must be noted that at the time of the first presentation of this petitioner to the United States Commissioner (page 15) he was

> ". . . not required to make a statement *and was advised that any statement made by him may be used against him.*" (Italics supplied)

Having been arrested on December 19, 1951, for these violations of the District of Columbia Code and the hearing continued until January 16, 1952 (page 13), there is no question but that this petitioner properly feared prosecution inasmuch as the first steps to bring him to trial in a criminal action had been taken. For this reason, this petitioner correctly concluded that he could not comply with the provisions of the Wagering Tax Act, 26 U.S.C., Sections 3290, 3291, nor the Treasury Regulation which was then in force and effect. At the time of this petitioner's arrest, to wit, December 19, 1951, the Treasury Regulation then in effect was Tr. Reg. 132 Sec. 325.50 (page 17). In pertinent part this regulation provided:

> "SEC. 325.50. Registry, return, and payment of tax. (a) Every person engaging in the business of accepting wagers and liable to the 10 percent excise tax imposed by section 3285 of the Internal Revenue Code

> (see section 325.24 of these regulations) and every person engaged in receiving wagers for or on behalf of any person so liable *shall on or before the last day of the month in which business is commenced file a return on Form 11-C. . . .*" (Italics supplied)

*This regulation of the Treasury Department stayed in effect until September 1, 1952*, approximately nine months after this petitioner was arrested for violations of the District of Columbia Code (Pages 18-19). It is most important to note that this regulation then provided that the $50 tax was not required to be paid until the last day of the month in which the gambler first accepted wagers. As applied to this petitioner who commenced the business of accepting wagers in December, 1951, this meant that he did not have to comply with this regulation until December 31, 1951. However, December 31, 1951, the date on which the $50 tax was required to be paid by this petitioner, was *12 days after the petitioner's arrest for gambling in violation of the District of Columbia Code*, a body of Federal law. The accuracy of the foregoing is further confirmed by a reference to a Press Release issued by the Commissioner of Internal Revenue on August 29, 1952 (page 18) wherein in pertinent part he stated:

> "Tighter regulations for the enforcement of the wagering tax law will go into effect Monday, September 1, Commissioner Dunlap announced today.
>
> 'Under the new rules, gamblers who are liable for the $50 special Federal occupational tax must purchase their stamps before engaging in any taxable wagering activity. *Previous regulations allowed bookmakers, policy operators, their agents and employees until the end of the month in which they first commenced business to purchase the wagering occupational stamp'.*" . . . (Italics supplied)

There can be no question, therefore, that at the time this petitioner was arrested for engaging in the lottery business in the District of Columbia, to wit, December 19, 1951,

he was not required by Tr. Reg. 132, Sec. 325.50 to have paid the $50 tax prior thereto. He would have been in full compliance with this regulation which implemented the Wagering Tax Act if he had paid the $50 tax and registered on December 31, 1951. Obviously, however, and in full accord with the language of Mr. Justice Minton in this cause, the petitioner properly refused to pay the $50 tax on December 31, 1951, and give the information called for in the registration form required to be filed contemporaneously therewith. For, if the petitioner had paid the $50 tax and furnished the information called for on December 31, 1951, he would have confessed his guilt or at least corroborated the evidence that the United States had against him for violations of the District of Columbia Code *for which he had already been arrested and was awaiting action by the United States Grand Jury.* In the light of the opinion of this Court in this cause, the original Tr. Reg. 132, Sec. 325.50 in effect in December, 1951, would be held invalid by this Court if it was in force and effect today as incorrectly interpreting the Wagering Tax Act. However, even though that be true, this petitioner should not now be prosecuted for having accepted that Regulation as a correct interpretation of the provisions of the Wagering Tax Act in December, 1951. For to hold to the contrary would bring this Court to an absurd conclusion. This results from the fact that if this Court would seek now to apply the Wagering Tax Act and Tr. Reg. 132, Sec. 325.50, *as amended* (page 19), to this petitioner, it must do so to all others who engaged in the business of accepting wagers between April, 1952 and September 1, 1952. For, the statute of limitations will not fully run until September 1, 1955, as to all who complied with the old Regulation and who, therefore, paid the $50 tax on the last day of the month in which they first engaged in business. If this Court would seek to invalidate the old Tr. Reg. 132, Sec. 325.50 retroactively, such persons could still be prosecuted for failing to have paid the $50 tax

*before* they engaged in the business of accepting wagers even though they had paid the $50 tax on the last day of the month in which they first engaged in business in full compliance with said Regulation.

The absurdity of any such conclusion is obvious. Likewise the converse. Old Tr. Reg. 132, Sec. 325.50 had the effect of force and law at the time this petitioner was arrested for violating the anti-lottery sections of the District of Columbia Code. Accordingly, this petitioner properly refused to comply with that Regulation as it contravened the Fifth Amendment as applied to him in the District of Columbia. *That Regulation was wholly retrospective,* not prospective as is the amended regulation which was effective September 1, 1952. To endeavor to apply the existing *amended* Regulation and this Court's interpretation of the Wagering Tax Act subsequent to the activities of this petitioner in December, 1951, would clearly constitute an "ex post facto" application and be in contravention of the United States Constitution. Certainly, this petitioner properly relied on the interpretation of the Wagering Tax Act by the tax experts of the Treasury Department who issued old Tr. Reg. 132, Sec. 325.50 which was in force and effect in December, 1951, providing that the $50 tax was to be paid on the last day of the month in which the gambler first accepted wagers, which in this particular instance would be December 31, 1951.

In addition to the foregoing, the opinion of this Court requires justice to be done to this particular petitioner. Mr. Justice Minton concluded that there was nothing compulsory about the payment of the $50 tax and making of the prescribed disclosures required by the Act. While at this point this petitioner must accept the conclusion of the Court, there are several further questions with which this court is now confronted. If the payment of the tax and required disclosures be voluntary, then this petitioner would not have had the right, at his subsequent criminal trial for violating the Federal lottery statutes in the Dis-

trict of Columbia, to successfully object to the admissibility of the form containing this information when sought to be introduced at trial. It requires no citation of authority to state the well expressed rule that the important element of determining the admissibility of a confession is that it should be voluntary. Since this Court has found that the payment of the $50 tax and making the prescribed disclosures is voluntary and not compulsory, there could be no valid objection raised to the admissibility of these facts or information even though unquestionably such information would have incriminated, or at least tended to incriminate this petitioner since compliance was not required until December 31, 1951.

Further, if this petitioner had complied with the Treasury Regulation in force and effect in December, 1951, and furnished the information called for, and the same assumed to be voluntary, corroborative facts found as a result of his confession could be introduced not only in his subsequent criminal trial for violating the Federal lottery statutes in force and effect in the District of Columbia but the information calling for the names of his accomplices, etc. would also bring down upon him the threat of penalties far worse than those contained in Sections 1501 and 1502 of Title 22 of the District of Columbia Code for violations of which he had been arrested in December, 1951. The information called for would have opened him up to an indictment for a conspiracy to commit the offenses with the possibility of imprisonment for five years or a fine of $10,000. Such leads obtained from the giving of information called for would certainly be "fruit from the poisonous tree" referred to by Mr. Justice Frankfurter in speaking for this Court in *Nardone* v. *United States*, 308 U.S. 338.

On the other hand, since the Regulation in force and effect in December, 1951, was *retrospective* in its application and required the admission of Federal criminal offenses which had been committed prior thereto, under penalty of prosecution for failing so to do, this petitioner properly

failed to give this information or pay the $50 tax because he would have been compelled in contravention of his rights as set forth in the Fifth Amendment to testify against himself *in a criminal action.*

The Court in its opinion (page 417) states:

> "... Petitioner maintains that the taxes imposed are retrospective in application. *It is argued that he must be liable for the tax under subchapter A in the sense that he must have already wagered before he is required to take out the occupational tax, and that to require him to do so compels admission that he has gambled.* We do not so read the statute. The Act does not mean one must first have made a wager as defined in subchapter A and therefor incurred liability to pay the tax levied therein before liability for the occupational tax attaches. . . ." (Italics supplied)

The Court has apparently failed to consider the petitioner's basic argument, namely that the *10% tax is itself retrospective.* That being true, this petitioner could never be required to pay the 10% tax for to do so would tend to incriminate him. Since, however, the $50 tax must be only paid by those who are required to pay the 10% tax, this petitioner was under no obligation to pay the $50 tax.

Mr. Justice Minton, in disposing of the argument that this tax is in fact a "penalty in the guise of a tax," stated at page 417 of the Opinion:

> "The short answer to this argument is that this Court has long held that the Federal Government may tax what it also forbids. United States v. Statoff, 260 U.S. 477, 43 S. Ct. 197, 67 L. Ed. 358. . . ."

Contrary to Mr. Justice Minton's statement, this petitioner asserts that this Court has never held that the Federal Government may tax that which it *wholly* forbids. *The Federal Government has wholly prohibited gambling to the fullest extent of its powers as granted by the United States Constitution.* The error in the Court's statement is readily apparent when it is realized that if Mr. Justice Minton's

statement is a correct statement of the law, then this Court has for many decades indulged in frivolous language in enunciating the doctrine of "penalty in the guise of a tax." For if the Federal Government can tax that which it wholly forbids then there never could be a "penalty in the guise of a tax." Accordingly, in one short sentence this Court would now be negating the many holdings of this Court over the years affirming the doctrine that a "penalty in the guise of a tax" is invalid. For example, the decision of this Court in *United States* v. *La Franca*, 282 U.S. 560, and the many decisions of this Court relied on therein, have been completely overruled unless this Court modifies the language which it has used in the instant cause.

In conclusion the petitioner directs the Court's attention to the fact that if its decision is to stand without modification, then there is no longer any protection afforded by the Fifth Amendment for all existing Federal criminal statutes could now be amended to provide for the payment of a tax and the furnishing of information prior to the commission of the Federal crime in question and said tax would have to be held valid by this Court. Basically, all Federal crimes are "voluntary". Since that is true all criminals would lose the protection of the Fifth Amendment. For, even though the information would be required to be supplied in advance of the commission of a Federal crime, this decision as it now stands destroys the doctrine that the privilege against self-incrimination is available against furnishing any link in a chain of evidence which may tend to incriminate. This decision effectively overrules *Hoffman* v. *United States*, 71 S. Ct. 814, 818, and all other decisions of like nature.

For the foregoing reasons this petitioner respectfully requests a rehearing, or at the least a modification of its

opinion, construing the Wagering Tax Act as applied to this petitioner in December, 1951.

WALTER E. GALLAGHER
821 Fifteenth Street, N. W.
Washington, D. C.

MYRON G. EHRLICH
Columbian Building
Washington, D. C.

**Certificate of Counsel**

I, Walter E. Gallagher, counsel for the petitioner in the above-entitled cause, do certify that the Petition for Rehearing filed in this cause is presented in good faith and not for delay.

WALTER E. GALLAGHER
*Counsel for Petitioner*

## APPENDIX A

### Exemplification Certificate

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

I, HARRY M. HULL, Clerk of the United States District Court for the District of Columbia, and keeper of the records and seal thereof, hereby certify that the documents attached hereto are true copies of the indictment and Commissioner's Transcript, Warrant of Arrest and complaint in Criminal Case No. 666-52.

In testimony whereof I hereunto sign my name and affix the seal of said Court, in said District, at Washington, D. C., this 1st day of April, 1955.

HARRY M. HULL
*Clerk*

(Seal)

By: HELEN M. McINTOSH
*Deputy Clerk*

---

I, CHARLES F. McLAUGHLIN, United States District Judge for the District of Columbia, do hereby certify that HARRY M. HULL whose name is above written and subscribed, is and was at the date thereof, Clerk of said Court, duly appointed and sworn, and keeper of the records and seal thereof, and that the above certificate by him made, and his attestation or record thereof, is in due form of law.

CHARLES F. McLAUGHLIN
*United States District Judge.*

April 1, 1955.

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I, HARRY M. HULL, Clerk of the United States District Court for the District of Columbia, and keeper of the seal thereof, hereby certify that the Honorable CHARLES F. McLAUGHLIN whose name is within written and subscribed, was on the 1st day of April, 1955, and now is Judge of said court, duly appointed, confirmed, sworn, and qualified; and that I am well acquainted with his hand writing and official signature and know and hereby certify the same within written to be his.

In testimony whereof I hereunto sign my name, and affix the seal of said Court at the city of Washington, in said District, on this 1st day of April, 1955.

HARRY M. HULL
*Clerk*

(Seal)

By: HELEN M. McINTOSH
*Deputy Clerk*

---

Filed in Open Court Apr. 22, 1952, Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

(Grand Jury Impanelled Mar. 3, 1952 and Sworn in Mar. 4, 1952)

Criminal No. 666-'52
Grand Jury No. 201-52
Vio. 22 D.C.C. 1501, 1502

THE UNITED STATES OF AMERICA

v.

FRANK LEWIS

The Grand Jury charges:

Continuously during the period from about December 13, 1951 to about December 19, 1951, within the District of Columbia, Frank Lewis was concerned as owner, agent and clerk, and in other ways, in managing, carrying on and promoting a lottery known as the numbers game.

SECOND COUNT:

On or about December 13, 1951, within the District of Columbia, Frank Lewis sold and transferred to David Scott a chance, right and interest in a lottery known as the numbers game.

THIRD COUNT:

On or about December 14, 1951, within the District of Columbia, Frank Lewis sold and transferred to David

Scott a chance, right and interest in a lottery known as the numbers game.

FOURTH COUNT:

On or about December 15, 1951, within the District of Columbia, Frank Lewis sold and transferred to David Scott a chance, right and interest in a lottery known as the numbers game.

FIFTH COUNT:

On or about December 19, 1951, within the District of Columbia, Frank Lewis sold and transferred to David Scott a chance, right and interest in a lottery known as the numbers game.

SIXTH COUNT:

On or about December 19, 1951, within the District of Columbia, Frank Lewis knowingly had in his possession certain tickets, certificates, bills, slips, tokens, papers and writings, used and to be used, and adapted, devised and designed for the purpose of playing, carrying on and conducting a lottery known as the numbers game.

CHARLES M. IRELAN
*Attorney of the United States in and for the District of Columbia*

A True Bill:
DAVID V. DOZIER
*Deputy Foreman.*

---

Filed Feb. 4, 1952

666-'52
G. J. 201-52
(Bond)

UNITED STATES COMMISSIONER
DISTRICT OF COLUMBIA

**Record of Proceedings in Criminal Cases**

Before Cyril S. Lawrence, Municipal Center, 300 Indiana Ave., N. W., Washington, D. C.
Complaint filed on Dec. 18, 1951, by David Scott.

Official title Pvt., M.P.D.C., charging violation of United States Code, Title ....., Section ....., on Dec. 13, 14, 15, 1951, at Wash. in the ..... division of the ..... district of Columbia as follows: Policy lottery, etc.—D.C.C. Title 22, Sec. 1501 and 1502.

Commissioner's Docket No. 10, Case No. 4755

THE UNITED STATES

v.

FRANK LEWIS

Warrants Issued:

Date Dec. 18, 1951 Warrant for Frank Lewis to (name and title of officer) W. Bruce Matthews, U. S. Marshal, D. C., etc.

Substance of return Warrant returned by Frank Coknfoe, Deputy, U. S. Marshal, D. C. Executed by the arrest of Frank Lewis on Dec. 19, 1951.

Proceedings on First Presentation of Accused to Commissioner:

Date Dec. 19, 1951 Arrested by U. S. Marshal on warrant of U. S. Comm. Lawrence.

Proceedings taken Complaint prepared. Defendant was informed of the complaint and of his right to have a preliminary hearing and to retain counsel. Defendant was not required to make a statement and was advised that any statement made by him may be used against him. Defendant was advised of his right to cross-examination witnesses against him and to introduce evidence in his own behalf. Hearing continued to Jan. 16, 1952 at request of def. to obtain counsel.

Outcome Hearing continued to Jan. 16, 1952 at 11:00 A.M.

Bail fixed Dec. 19, 1951 Amount $1500.00 Bonded Dec. 19, 1951, by cash deposited by (name) ..... Address ..... transmitted to clerk of district court ....., 19.... [or] by surety (name) Louis Weinstein Address 406 5th St., N. W., who justified by affidavit dated Dec. 19, 1951.

Jan. 16, 1952—Hearing continued to Jan. 30, 1952 at request of def. Myron Ehrlich, atty.

Preliminary Examination:

Date Jan. 30, 1952 Appearances for United States Wm. S. Bryant, Asst. U.S. Atty. Accused Myron Ehrlich, atty.

Witnesses for United States:

Det. Olof J. Schelin, #1 Pct., M.P.D.C. Proceedings taken Probable cause shown. Held for Grand Jury.

Outcome Defendant held for the action of the Grand Jury. Bail fixed Jan 30, 1952 Amount, $1500.00 Bonded Jan. 30, 1952, by cash deposited by (name) ..... Address ..... transmitted to clerk of district court ....., 19.... [or] by surety (names) Louis Weinstein Address 406 5th St., N. W. who justified by affidavit Jan. 30, 1952.

Certified to be a correct transcript.

Made this 30th day of Jan., 1952.

Transmitted to Clerk of United States District Court for the district of Columbia, Jan. 30, 1952.

CYRIL LAWRENCE
*United States Commissioner.*

---

Filed Feb. 4, 1952

666-'52
G. J. 201-52

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Commissioner's Docket No. 10 Case No. 4755

UNITED STATES OF AMERICA

v.

JOHN DOE, colored, name unknown, about 30 years of age, 6 ft., 220 lbs., dark skin, two gold upper teeth. (Frank Lewis)

**Warrant of Arrest**

To W. Bruce Matthews, U. S. Marshal, D. C., or any other person authorized to serve same.

You are hereby commanded to arrest the above described John Doe, and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with on Dec. 13, 14, 15, 1951 at Wash., D. C.,

did unlawfully set up and promote a policy lottery and possess number slips, etc. in violation of D.C.C. Title 22, Sections 1501 and 1502.

Date Dec. 18, 1951.

CYRIL LAWRENCE
*United States Commissioner.*

**Return**

Received December 18, 1951 at Wash., D. C., and executed by arrest of Frank Lewis at Wash., D. C. on December 19, 1951.

W. BRUCE MATTHEWS
*U. S. Marshal*
Wash. District of D. C.

By FRANK COKNFOE
*Deputy*

Date December 19, 1951.

---

Filed Feb. 4, 1952

666-'52
G. J. 201-52

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Commissioner's Docket No. 10 Case No. 4755

UNITED STATES OF AMERICA

v.

JOHN DOE, colored, name unknown, about 30 years of age, 6 ft., 220 lbs., dark skin, two gold upper teeth. (Frank Lewis)

**Complaint for Violation of D.C.C. Title 22, Sections 1501 and 1502**

Before Cyril S. Lawrence, Commissioner Municipal Center, Washington, D. C.

The undersigned complainant being duly sworn states: That on or about Dec. 13, 14, 15, 1951, at 100 G Street, N. W. (N & G Cafe) Washington, in the District of Columbia, the above described John Doe did unlawfully set up and promote a policy lottery and possess number slips, did spe-

cifically on Dec. 15, 1951 accept from Pvt. David Scott, Adm. Hdqtrs., M.P.D.C. a numbers bet on #229 for 10¢, #311 for 10¢, #511 for 25¢, #430 for 10¢ and #731 for 25¢ paid in cash to John Doe by the said Pvt. David Scott and the said Pvt. Scott received a receipt for same.

And the complainant further states that he believes that Pvt. David Scott, Adm. Hdqtrs., M.P.D.C. are material witnesses in relation to this charge.

DAVID SCOTT
*Pvt., Adm. Hdqtrs, M.P.D.C.*

Sworn to before me, and subscribed in my presence, Dec. 18, 1951.

CYRIL LAWRENCE
*United States Commissioner.*

---

**Act of March 3, 1901, 31 Stat. 1330, ch. 854, § 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, § 2, Title 22, D.C. Code, Sec. 1501:**

LOTTERIES—PROMOTION—SALE OR POSSESSION OF TICKETS.

If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy

or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

**Act of April 5, 1938, 52 Stat. 198, ch. 72, § 2, Title 22, D. C. Code, Sec. 1502:**

If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both.

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Tr. Reg. 132, Sec. 325.50. Registry, return, and payment of tax. (a) Every person engaging in the business of accepting wagers and liable to the 10 percent excise tax imposed by section 3285 of the Internal Revenue Code (see section 325.24 of these regulations) and every person engaged in receiving wagers for or on behalf of any person so liable shall on or before the last day of the month in which business is commenced file a return on Form 11-C. The return shall be filed with the collector of internal revenue for the district in which is located the taxpayer's office or principal place of business. If such taxpayer resides in the United States, but has no office or principal place of business in the United States, the return shall be filed with the collector of internal revenue for the district in which he resides. If the taxpayer has no office, residence, or principal place of business in the United States, the return shall be filed with the Collector of Internal Revenue, Baltimore, Md. The collector, upon request, will furnish to the taxpayer the proper forms which shall be filled out and signed as indicated therein.

(b) Every person engaged on November 1, 1951, in any business which makes him subject to the special tax, or first engaging in such business during the month of November 1951, shall register and file a return on Form 11-C and pay the tax on or before November 30, 1951. Thereafter,

such person shall register, file a return, and pay the tax on or before the last day of July of each year.

(c) Each return shall show the taxpayer's full name. A person doing business under an alias, style, or trade name shall give his true name, followed by his alias, style, or trade name. In the case of a partnership, association, firm, or company, other than a corporation, the style or trade name shall be given, also the true name of each member and his place of residence. In the case of a corporation, the true name and title of each officer and his place of residence shall be shown.

(d) Each person engaged in the business of accepting wagers on his own account shall furnish the name and address of each place where such business is conducted, together with the true name and residence address of each agent or employee accepting wagers on his behalf. Each agent or employee of a person accepting wagers shall furnish the name and residence address of each person (ie., individual, partnership, corporation, etc.) on whose behalf such wagers are accepted.

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"The Commissioner in a Press Release dated August 29, 1952, explained the amended regulations at ¶ 42,812 as follows:

"Tighter regulations for the enforcement of the wagering tax law will go into effect, Monday, September 1, Commissioner Dunlap announced today.

"Under the new rules, gamblers who are liable for the $50 special Federal occupational tax must purchase their stamps before engaging in any taxable wagering activity. *Previous regulations allowed bookmakers, policy operators, their agents and employees until the end of the month in which they first commenced business to purchase the wagering occupational stamp.*

"Commissioner Dunlap said that the old regulations, which have been in effect since November 1, 1951, caused difficulties in the enforcement of the stamp tax. When gamblers and their agents were arrested by local authorities their defense usually was that they had just commenced business. In the absence of proof to the contrary, no Federal prosecution could be undertaken if the arrested person paid the special wagering tax before the end of the month

in which he was arrested. The new regulations, which become effective on Monday, provide that anyone in the business of taking taxable wagers for his own account or for the account of another person will be liable to prosecution if he does not have a wagering stamp at the time he accepts a bet.

"A new occupational stamp must be purchased on or before July 1 of each year that the wagering business continues.

"The new rule is expected to assist the Bureau of Internal Revenue in its task of collecting the 10 percent excise tax on wagers placed with bookmakers, policy operators, and persons conducting lotteries." (Emphasis supplied)

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"TR. REG. 132, SEC. 325.50. *Registry, return and payment of tax.*

"(a) No person shall engage in the business of accepting wagers subject to the 10 percent excise tax imposed by section 3285 of the Internal Revenue Code (see section 325.24) until he has filed a return on Form 11-C and paid the special tax imposed by section 3290. Likewise, no person shall engage in receiving wagers for or on behalf of any person engaged in such business until he has filed a return on Form 11-C and paid the special tax imposed by section 3290 of the Internal Revenue Code. * * *"